SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 325

MORLEY CONSTRUCTION COMPANY ET AL.,
PETITIONERS,

vs.

MARYLAND CASUALTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	a	1
Caption (omitted in printing)	a	
Record from D. C. U. S., Western Missouri	a	1
Citation and service (omitted in printing)	b	
Caption (omitted in printing)	1	
Amended bill of complaint	1	1
Exhibit "A"—Deposit agreement between Morley Construction Co. and Maryland Casualty Co.	9	10
Exhibit "B"—Letter, April 27, 1933, Morley Construction Co. to Maryland Casualty Co.	11	12
Joint and separate motion to dismiss, answer and counter-claim	13	14
Exhibit "A"—Bill of complaint, etc., in case of Maryland Casualty Co. v. Morley Construction Co. in Supreme Court, District of Columbia	23	24
Exhibit "B"—Letter, November 27, 1933, Federal Reserve Bank to Merchants Bank	29	30
Reply to joint answer, and answer to counterclaim	29	31
Decree	35	37

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 13, 1936.

—8386-C

	Original	Print
Record from D. C. U. S., Western Missouri—Continued.		
Petition for rehearing	37	40
Order overruling petition for rehearing	44	47
Notice of appeal	44	47
Petition for appeal	44	48
Assignments of error	45	49
Order allowing appeal	48	52
Appeal bond (omitted in printing)	48	
Notice of filing præcipe for transcript and election as to printing	50	53
Præcipe for transcript	50	53
Election as to printing	51	54
Order, April 19, 1935, extending time to file transcript of evidence	51	54
Order, May 22, 1935, extending time to file bill of exceptions	52	55
Order, May 22, 1935, extending time to file transcript	52	55
Order, June 29, 1935, extending time to file bill of exceptions	52	55
Order, June 29, 1935, extending time to file transcript	52	56
Order, July 26, 1935, extending time to file bill of exceptions and transcript	53	56
Order, July 26, 1935, extending time to file transcript	53	56
Order, September 7, 1935, extending time to file bill of exceptions	53	57
Order, September 7, 1935, extending time to file transcript	53	57
Statement of evidence	53	57
Caption	53	57
Testimony of Herbert F. Morley	54	57
Plaintiff's Exhibit 1—List showing unpaid labor and material bills	55	59
Plaintiff's Exhibit 2—List of claims in addition to labor and material claims	57	61
Plaintiff's Exhibit 3—Agreement between plaintiff and defendant, dated April 28, 1933	57	62
Plaintiff's Exhibit 4—Letter, April 28, 1933, Morley Construction Co. to Veterans Administration	61	65
Plaintiff's Exhibit 5—Performance bond executed by plaintiff and defendant	61	66
Defendants' Exhibit 1—Record of outstanding bills on Batavia operation	71	76
Defendants' Exhibit 2—Complete record of figures kept on Batavia job	73	77
Defendants' Exhibit 3—Agreement between plaintiff and defendant executed April 29, 1933	73	77
Testimony of James F. Kelly	81	86
Plaintiff's Exhibit 6—List of contractors and materialmen on Batavia job	85	88

	Original	Print
Record from D. C. U. S., Western Missouri—Continued		
Statement of evidence—Continued.		
Testimony of Hal R. Lebrecht	89	91
George F. Cushwa	90	93
Defendants' Exhibit 4—Letter, Veterans Administration to Morley Construction Co., September 24, 1934	94	97
Testimony of Clifford H. Weiss	94	98
Plaintiff's Exhibit 9—Resolution designating Manufacturers & Traders Trust Co. as depositary	97	100
Plaintiff's Exhibit 10—Signatures of persons authorized to draw checks	98	100
Testimony of J. Frank Miller	99	101
Clifford L. Johnson	99	101
James F. Kelly (recalled)	100	102
Plaintiff's Exhibit 7—Statement showing balance due on contract, bills payable, etc.	100	103
Motion to dismiss	101	103
Testimony of Bernard D. Morley	101	104
Defendants' Exhibit 5—Statement of cost of plastering contract to complete work	111	115
Testimony of George A. Berry	112	116
Bernard D. Morley (recalled)	113	117
Herbert F. Morley (recalled)	113	118
Order approving statement of evidence	114	119
Agreement as to statement of evidence	115	119
Order, October 14, 1935, extending time to file transcript	115	120
Memorandum opinion, findings of fact, Conclusions of law and indicated decree	115	120
Clerk's certificate to transcript (omitted in printing)	120	
Appearances of counsel (omitted in printing)	121	
Order of submission	122	126
Opinion, Booth, J.	123	126
Decree	135	138
Petition for rehearing (omitted in printing)	136	
Order denying petition for rehearing	149	139
Motion for stay of mandate	149	139
Order staying issuance of mandate	150	140
Clerk's certificate (omitted in printing)	151	
Order allowing certiorari	152	140

[fol. a] [Captions omitted]

[fol. b] Citation, in usual form, showing service on Harris & Koontz, filed April 19, 1935, omitted in printing.

[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

AMENDED BILL OF COMPLAINT—Filed March 3, 1934

Now comes the plaintiff and for its cause of action against the defendants states:

1. That the plaintiff is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of and a citizen and resident of the State of Maryland, engaged in the general business of writing casualty and surety insurance, and licensed to do business in the State of Missouri.

2. That defendant Morley Construction Company is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Missouri, and a citizen and resident of the State of Missouri, and engaged in the State of Missouri and elsewhere in the general contracting business, with its principal office in Kansas City, Missouri. That defendant Merchants Bank of Kansas City, Missouri, is a corporation duly organized under the laws of the State of Missouri, and a citizen and resident of the State of Missouri, with its principal office and place of business in Kansas City, Missouri, engaged in the general banking business. That the cause of action herein alleged is a petition in equity affecting property in Kansas City, Missouri, involving corporations of Missouri located and doing business in Kansas City, Missouri, and in the Western District of Missouri, and within the jurisdiction of this Court, and that this action is one of a civil nature involving exclusive of interest a sum in excess of the sum of Three Thousand Dollars ($3,000.00). That every issue of law and fact herein is wholly between citizens of different states, to-wit, plaintiff a citizen and resident of the [fol. 2] State of Maryland, and the defendant citizens and residents of the State of Missouri.

Plaintiff for its cause of action against the defendants, and each of them, states that plaintiff as heretofore stated is engaged in the business in the State of Missouri and in every state in the United States, of writing among other things surety bonds for others for hire, and that the defendant Morley Construction Company is a corporation as heretofore stated and engaged in the general contracting business in the State of Missouri and elsewhere in the United States. That the defendant Merchants Bank of Kansas City, Missouri is a corporation organized under the general banking laws of the State of Missouri, and as such is operating a state bank in Kansas City, Missouri, and is the depository or bank in which the defendant Morley Construction Company carries its account and in which was deposited the funds as hereinafter stated.

3. Plaintiff states that on or about July 28, 1932, the defendant Morley Construction Company entered into a written contract with the Veterans Administration Department of the United States of America under which said defendant agreed to furnish all labor and material for and to fully construct and complete a veterans hospital in or near the city of Batavia, New York, at and for the sum of Five Hundred and Forty Thousand Three Hundred Dollars ($540,300.00), in accordance with the contract therefor and in accordance with the plans and specifications therefor.

4. That on or about the 28th day of July, 1932, the defendant Morley Construction Company made application to the plaintiff herein to procure the plaintiff herein to execute, as surety for defendant Morley Construction Company a bond to the Veterans Administration Department of the United States of America in the penalty of Two Hundred Seventy-five Thousand Dollars ($275,000.00), conditioned upon the completion of said contract and the payment of all bills for labor and material, and state that pursuant to such application and in consideration of the obligations therein assumed by such applicant, and in consideration of the bond premium paid and to be paid, plaintiff did execute as surety for defendant Morley Construction Company as principal a bond to the Veterans Administration Department of the United States of America, conditioned upon the completion by defendant Morley Construc-

tion Company of the building and/or building and improvements contracted to be erected and constructed as provided in said contract, and conditioned upon the payment by defendant Morley Construction Company of all bills for labor [fol. 3] and material used or consumed in the construction of said building.

5. Plaintiff states that defendant Morley Construction Company entered upon the performance of said contract and proceeded therewith until on or about the 27th day of April, 1933, at which time defendant Morley Construction Company became involved in financial difficulties and became involved in disputes and controveries with laborers and other persons performing labor and furnishing material upon said job and notified the plaintiff, surety upon said bond for said contract, that it was unable to proceed with the construction of said building unless the plaintiff would furnish to defendant Morley Construction Company advances or money for the purpose of completing said work.

6. Thereafter and on the 28th day of April, 1933, the plaintiff and defendant Morley Construction Company entered into a supplemental contract in order that the construction and erection of the buildings covered by said contract might proceed and be completed, and under and by virtue of which the plaintiff agreed to and did deposit with the M & T Trust Company in the City of Buffalo, New York, to the account of Morley Construction Company the sum of Five Thousand Dollars ($5,000.00), and coincident therewith Morley Construction Company deposited in said M & T Trust Company the sum of Five Thousand Dollars ($5,000.00), both of such deposits to be used towards the completion of said contract and to be disbursed for such purpose under the joint control of defendant Morley Construction Company and the plaintiff, Maryland Casualty Company, and in which said contract defendant Morley Construction Company agreed to deposit in said account in said M & T Trust Company all estimates and moneys received thereafter from the United States Government or from said Veterans Administration Department because of said work, all to be subject as heretofore stated to the joint control of plaintiff and Morley Construction Company towards the completion of said work.

That by said contract defendant Morley Construction Company agreed that out of the proceeds of said job if sufficient there be, there should be repaid to the Maryland Casualty Company the sum of Five Thousand Dollars ($5,000.00) so advanced by it, and agreed that if such proceeds were not sufficient for such purpose that said Morley Construction Company would pay back the amount so advanced by the plaintiff. By said contract plaintiff further agreed to place in said account subject to the limitations hereinbefore stated a sufficient sum of money to pay off all plasterers' claims unpaid and sufficient money to com-
[fol. 4] plete the plastering contract, and defendant Morley Construction Company agreed to repay to the plaintiff all moneys so advanced to them for this purpose, and plaintiff states that pursuant to said contract it has deposited in said account or paid out on account of such claims and for such work an additional sum of Five Thousand Seven Hundred Dollars ($5,700.00), making a total of Ten Thousand Seven Hundred Dollars ($10,700.00), heretofore advanced by the plaintiff as such surety in the completion of said work. Plaintiff states that a copy of said supplemental agreement is hereto attached and marked Exhibit A.

7. Plaintiff states that upon the execution of said supplemental agreement defendant Morley Construction Company acting by and through its president, H. F. Morley, notified the said Veterans Administration Department of the United States of America to thereafter send to said M & T Trust Company at Buffalo, New York, all estimates or all money due on estimates or on said contract thereafter to the said M & T Trust Company for deposit to the account of defendant Morley Construction Company under the terms of said supplemental agreement.

Plaintiff further states that thereafter the said Veterans Administration Department in accordance with the terms of said supplemental contract forwarded each estimate or amount due on each estimate, except the check or voucher for the final estimate and retent, to the said M & T Trust Company for deposit in accordance with said supplemental contract and such amounts were so deposited in said trust company and disbursed in accordance with said supplemental agreement.

8. Plaintiff states that after the execution of said supplemental agreement, defendant Morley Construction Com-

pany proceeded with the completion of said contract and did complete the erection and construction of said buildings or improvements, whereupon there became due and payable under the terms of said contract a final estimate and the return or payment of the accumulated amount of retained percentage which had been held by the said Veterans Administration Department, in all amounting to the sum of Fifty-nine Thousand Seven Hundred Eighty and 82/100 Dollars ($59,780.82), which under the terms of said supplemental contract and direction to said Veterans Administration Department should have been sent and forwarded to said M & T Trust Company for deposit in accordance with said supplemental contract.

9. Plaintiff states that said Veterans Administration Department in accordance with said original contract issued [fol. 5] its check or warrant in the usual form upon the United States Treasury, dated November 13, 1933, and being warrant No. 2213155, and payable to the order of Morley Construction Company for the amount of Fifty-nine Thousand Seven Hundred Eighty and 82/100 Dollars ($59,780.82). Plaintiff states that upon the issue of said warrant the said Veterans Administration Department or some employee or official therein through mistake, negligence or inadvertence sent said warrant direct to defendant Morley Construction Company in Kansas City, Missouri, instead of sending the same in accordance with said supplemental agreement and said notice to it to said M & T Trust Company, and defendant Morley Construction Company endorsed and delivered said check to defendant Merchants Bank of Kansas City, Missouri, and procured said Merchants Bank to issue a cashier's check for the amount of said warrant, $59,780.82, payable to Herbert F. Morley, president of defendant Morley Construction Company, Trustee; that after issuing such cashier's check caused such warrant to be deposited in the Federal Reserve Bank, at Kansas City, in the usual course for collection and said warrant was in due course forwarded to the Treasury of the United States for payment, and in the meantime defendant Merchants Bank held said cashier's check, without delivery, to be delivered upon payment of said warrant.

10. Plaintiff states that upon receiving information from the said Veterans Administration Department that it

had by mistake sent said warrant direct to defendant Morley Construction Company and not to said M & T. Trust Company as provided by said contract and by said direction, the plaintiff demanded of defendant Morley Construction Company that it immediately send the amount of the proceeds of said warrant so converted by it to its own use to the said M. & T. Trust Company to be deposited and disbursed in accordance with said supplementary agreement, and plaintiff states that the defendant Morley Construction Company has failed and refused to so transmit said money to said M. & T. Trust Company as provided by said contract and by its said written direction to the said Veterans Administration Department, and still refuses so to do.

11. Plaintiff states that thereafter it learned that said warrant had not been paid by the Treasurer of the United States, wherefore plaintiff instituted a proceeding in the District Court of the District of Columbia to stop the payment of said warrant and procured from said Court an order temporarily stopping the payment of said warrant, which order is still in effect, and under said warrant is [fol. 6] being held unpaid pending the disposition of said temporary order.

12. Plaintiff states as hereinbefore set out that it has to this date as surety as herein described, advanced for and paid bills for labor and material entering into the construction of said Veterans Hospital in the amount of Ten Thousand Seven Hundred Dollars ($10,700.00), and plaintiff further states that there are now outstanding bills or claims for labor and material against said Veterans Hospital job and for which plaintiff will be responsible under its bond in approximately the sum of One Hundred and Two Thousand Dollars ($102,000.00), and states that there remains in the said deposit in said M. & T. Trust Company under the terms of said supplemental agreement the sum of only approximately Seven Thousand Dollars ($7,000.00).

13. Plaintiff states that under and by virtue of the terms of said supplemental agreement it became and is entitled to have said money so received by defendant Morley Construction Company sent to the said M. & T. Trust Com-

pany for deposit and disbursement in accordance with the terms of said supplemental contract.

14. Plaintiff further states that as surety upon the bond of defendant Morley Construction Company for the completion of said contract and for the payment of all bills for labor and material entering therein, it became upon the payment and advancement of said Ten Thousand Seven Hundred Dollars ($10,700.00) subrogated to the extent of such payment to the estimates or moneys thereafter due from the said Veterans Administration Department upon said construction contract.

15. Plaintiff further states that it is the primary duty and obligation under the laws obtaining of defendant Morley Construction Company to pay off and discharge all outstanding bills for labor and material performed or used in the construction of said improvements and to indemnify and to save the plaintiff harmless from any loss or damage on account thereof, and states that there are now due and unpaid as heretofore stated on account of bills for such labor and material the sum of One Hundred and Seven Thousand Dollars ($107,000.00), and states that it is the duty and obligation of defendant Morley Construction Company to exonerate this plaintiff from the payment thereof and to pay the same, and that the plaintiff is entitled to have used for that purpose and applied thereon the said sum of Fifty-nine Thousand Seven Hundred Eighty and 82/100 Dollars ($59,780.82) so improperly received by defendant Morley Construction Company and improperly and [fol. 7] illegally applied and converted to its own use as hereinbefore stated.

16. Plaintiff further states that in view of the financial condition of the Morley Construction Company as hereinafter stated and under and by virtue of said supplementary agreement, it is entitled to have a specific performance of said supplementary agreement and to have defendant Morley Construction Company ordered and required to forward said sum of $59,780.82 so improperly received by it to said M. & T. Trust Company in accordance with the terms of said supplementary agreement.

17. Plaintiff further states that defendant Morley Construction Company is involved in other financial complica-

tions and states that defendant Morley Construction Company is wholly insolvent.

18. Plaintiff further states that it is entitled to have the money so deposited with defendant Merchants Bank of Kansas City, Missouri, and represented by said Government Warrant, impressed with a lien and impressed with a trust so that the same may be disbursed and used as required by the terms of said supplemental contract and as plaintiff is entitled to have it disbursed in accordance with its right of subrogation, and states that unless a lien is established thereon and/or the same is impressed with a trust for the purposes hereinbefore stated, the defendant Morley Construction Company will or can withdraw said money and use the same for its own purposes or for purposes beyond the purposes as set out in said supplementary contract, or conceal the same so that the said funds will not be available for the purposes for which under the terms of said contract and under the obligation of said Morley Construction Company the same should be used, and plaintiff has good reason to believe and does believe that defendant Morley Construction Company, unless restrained, will so convert or conceal such funds, and that unless the said funds are so impressed with a trust or lien, and unless the defendant Morley Construction Company and its officers, servants and agents are restrained and enjoined from withdrawing or disbursing said money or any part thereof for any purpose other than that covered by said supplemental agreement, and unless said defendant Merchants Bank of Kansas City, Missouri, is restrained from permitting the withdrawal of said funds or any part thereof for any purpose other than that set out in said supplementary agreement, this plaintiff will suffer an irreparable loss, and states that the plaintiff has no adequate remedy at law for any relief in the premises.

[fol. 8] Wherefore, plaintiff prays the Court by its order to restrain and enjoin defendant Morley Construction Company, its officers, agents and employees from withdrawing or disbursing any of the said sum of $59,780.82 so deposited with defendant Merchants Bank of Kansas City, Missouri, and represented by said Government Warrant, until the further order of this Court, and that this Court by its or-

der and decree fix and establish a lien and impress a trust upon said fund for the purpose and to the end that the same be used and disbursed in accordance with the terms of said supplementary agreement and such rights of subrogation as the Court may determine the plaintiff has in the premises, and that the Court by its order exonerate the plaintiff from the payment under said bond until the said funds shall have been used and applied in accordance with the terms of said supplementary contract and in payment for the outstanding bills for labor and material performed and used in the construction of improvements under said construction contract, and that the Court by its order and decree direct and require defendant Morley Construction Company to authorize and direct the Treasurer of the United States and/or the Veterans Administration Department of the United States to turn over said warrant to the Clerk of this Court to be transmitted by said Clerk to the said M & T Trust Company in accordance with the terms of said supplementary contract, and that the Court by its order and decree direct and require defendant Morley Construction Company to exonerate this plaintiff from the payment of any bills for labor and material due or to become due on account of the construction of said improvements, and to pay off and discharge any and all of such bills and to protect and to save plaintiff harmless on account thereof, and that defendant Merchants Bank of Kansas City, Missouri, be ordered and directed to release any apparent right it may have to said warrant and to require and order said Merchants Bank to authorize and direct the Treasurer of the United States and/or said Veterans Administration Department to turn over and deliver said warrant to the Clerk of this Court, and that pending the hearing of this case the Court issue a restraining order restraining and enjoining defendant Morley Construction Company from withdrawing or disbursing any of said funds so deposited with defendant Merchants Bank of Kansas City, Missouri, and that defendant Merchants Bank of Kansas City, Missouri, be restrained and enjoined from permitting the withdrawal or disbursement of such funds pending the hearing of this action, and that the Clerk of this Court upon receipt of said warrant be directed to send the same to said M & T Trust Company for deposit in accordance with said agreement

[fol. 9] of April 28, 1933, and for such other and further relief as to the Court may seem just and proper in the premises.

Spencer F. Harris, Paul G. Koontz, Attorneys for Plaintiff.

Duly sworn to by Spencer F. Harris. Jurat omitted in printing.

Received copy of the foregoing Amended Complaint together with the Exhibits attached this 3 day of March, 1934.
Buchholz & O'Donnell, Attys. for Defts.

EXHIBIT "A" TO AMENDED COMPLAINT

Agreement

Whereas the Morley Construction Company of Kansas City, Missouri is the General Contractor under a contract with the United States Government for the construction of the Veterans' Administration Hospital at Batavia, New York, said contract bearing date of July 23, 1932 and

[fol. 10] Whereas the Maryland Casualty Company executed a bond bearing date of August 1, 1932, wherein and whereby said Maryland Casualty Company guaranteed the faithful performance of the above mentioned contract and

Whereas the Morley Construction Company has encountered financial difficulties in the construction of said Veterans' Administration Hospital and has called upon the Maryland Casualty Company for financial assistance in regard to the completion of said contract in accordance with a letter to the Maryland Casualty Company from the Morley Construction Company bearing date of April 27, a copy of which is hereto attached and made a part of this instrument, in consideration of the mutual promises of the parties hereto it is mutually agreed as follows:

First. The Morley Construction Company hereby agrees to deposit at the M & T Trust Company in the City of Buffalo, New York, the sum of Five Thousand ($5,000.00) Dollars and to deposit from time to time certain other sums of money to be used toward the completion of said

contract. The Morley Construction Company further agrees to deposit in said account for the benefit of said contract all moneys and estimates received from the United States Government because of said work.

Second. The Maryland Casualty Company hereby agrees to deposit in said M & T Trust Company to the account of the Morley Construction Company the sum of Five Thousand ($5,000.00) Dollars.

Third. It is mutually understood and agreed that the said Maryland Casualty Company shall have joint control of all moneys deposited in said account and that no check, draft or withdrawal order shall be drawn on said account and paid by said bank without the approval of the said Maryland Casualty Company by its representatives, James F. Kelly and/or Martin C. Schaus, said approval to be designated on said check, draft or withdrawal order by the initials of the above individuals, to-wit, J. F. K. and/or M. C. S.

Fourth. The Morley Construction Company hereby agrees to pay back to the Maryland Casualty Company the aforementioned sum of Five Thousand ($5,000.00) Dollars out of the proceeds of said job if there be sufficient money and if not, they thereby bind themselves and agree to pay said money themselves to the Maryland Casualty Company.

Fifth. The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plaster-[fol. 11] ers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory.

Sixth. The Morley Construction Company hereby agrees to pay to the Maryland Casualty Company any and all moneys advanced to them for payment of plasterers' claims or other laborers' claims on the D. Giamberardino & Sons contract and any and all moneys advanced by the said Maryland Casualty Company to assist in the completion of the D. Giamberardino & Sons contract.

Seventh. The Morley Construction Company hereby agrees to give a note in the sum of Five Thousand

($5,000.00) Dollars bearing even date of this instrument to the Maryland Casualty Company as security to them for the payment of the sum of Five Thousand ($5,000.00) Dollars mentioned in Paragraphs Second and Fourth in this instrument.

Dated April 28, 1933.

Morley Construction Company, by H. F. Morley, President. Maryland Casualty Company, by James F. Kelly.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

On this 28th day of April, 1933 before me personally came H. F. Morley, to me known, who, being by me duly sworn, did depose and say that he is the president of the Morley Construction Company, the company described in and which executed the foregoing instrument; that he has the authority to sign such instruments and that he affixed his signature thereto by such authority.

William H. Robinson, Notary Public in and for the County of Erie, New York.

EXHIBIT "B" TO AMENDED COMPLAINT

April 27th, 1933.

Maryland Casualty Company, Baltimore, Maryland.

GENTLEMEN:

As you have been heretofore informed, the work on the Veterans' Administration Hospital at Batavia, New York [fol. 12] has been stopped by reason of labor difficulties encountered by Sub-Contractor D. Giamberardino & Sons.

It is claimed by the laborers that they have not been paid since March 9, 1933. These unpaid claims amount to about $7,500.00. In addition to this there are some disputed bills, the laborers claiming that they have not received the full prevailing wage although they have signed receipts for the full amounts. These claims aggregate approximately $5,000.00. This is as the situation now appears.

The work on the plastering contract is at a stand-still and this letter is to inform you that the Morley Construc-

tion Company, because of the situation on the plastering contract over which they have no control and because of their general financial situation, cannot proceed with the work without some financial assistance. We propose that the Maryland Casualty Company advance to us sufficient money to meet the unpaid plasterers' and laborers' bills as stated above—that is, $7,500.00—and in addition to that sufficient money to meet the disputed bills that we have receipts for if this is necessary to get the men back to work. We estimate that the cost to complete the plastering contract will be approximately $19,550.00. This figure does not include the unpaid plasterers' and laborers' claims as stated above. There is still owing on this contract the sum of $13,500.00, leaving a balance of $6,050.00 to complete the plastering contract on which figure we need financial assistance.

We agree to give the Maryland Casualty Company a demand note payable one year from date for the moneys advanced and, as an additional security, to assign any right which we may have against the National Surety Company, the bonder of D. Giamberardino & Sons, plaster contractor, up to the amount of the indebtedness and will render every assistance necessary to prosecute suit against the National Surety Company or any other corporation or individual against which we have a right of action.

In the event that the financial assistance as stated above is given to us we have the assurance that our bank will advance us sufficient money to complete the job according to our contract and pay all outstanding indebtedness on this job.

We wish to urge upon you at this time the necessity of prompt action in this matter. The labor condition is a serious one and the Government is demanding immediate action. The facts contained in this communication are substantially true and are set out for the purpose of inducing [fol. 13] the Maryland Casualty Company to advance moneys and credits to us as stated above.

Very truly yours, —— ——.

Copy.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JOINT AND SEPARATE MOTION TO DISMISS, ANSWER AND COUNTER-CLAIM—Filed January 5, 1934; Refiled September 27, 1934

1. Now come the defendants, and each of them, and pray the court to dismiss plaintiff's Bill of Complaint herein, for the reason that the said Complaint in Equity fails to state facts sufficient to constitute a cause of action or basis for relief against the defendants, or either of them.

2. Defendants, and each of them, state that heretofore defendant Morley Construction Company received a check numbered 2,213,115, dated November 13, 1933, for Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars, drawn on the Treasurer of the United States, by J. B. Scommer, Disbursing Clerk, Veterans Administration, Symbol 11-500, to the order of Morley Construction Company; that said check was not deposited in the account of the defendant Morley Construction Company with the defendant Merchants Bank of Kansas City, Missouri, but was deposited by its President, Herbert F. Morley, with the defendant Merchants Bank of Kansas City, Missouri, on the 22d day of November, 1933, for collection, at which time it was agreed by the said defendant Merchants Bank that when collected said sum would be credited to Herbert F. Morley, as Trustee, and a Cashier's Check delivered to said Herbert F. Morley, as Trustee, for said sum; that after said deposit was made, said defendant Merchants Bank forwarded said check through the usual channels for collection to the Treasurer of the United States and deposited same in its account with the Federal Reserve Bank, of Kansas City, Missouri; that thereafter, and before the said check was paid by the Treasurer of the United States, the plaintiff herein filed a Bill of Complaint for Injunction and Rule to Show Cause, on the 25th day of November, 1933, in the Supreme Court of the District of Columbia Holding an Equity Court, alleging, in substance the same matters and things against the defendant Morley Construction Company, which were alleged in the Bill of Complaint herein, and alleging that the said check had not yet been paid by the Treasurer of the United States, a copy of said "Bill of Complaint for Injunction,

[fol. 14] and Rule to show Cause," and the Marshal's Return thereto, is hereto attached and marked Exhibit "A".

That thereupon, the Treasurer of the United States refused to honor the said check, or to pay the same until the said suit so pending in the said District Court was disposed of, and that thereafter the defendant Merchants Bank of Kansas City, Missouri, received from the Federal Reserve Bank, of Kansas City, Missouri, a notice advising said Merchants Bank that the said Federal Reserve Bank was in receipt of a letter from the Treasurer of the United States advising that injunction proceedings had been filed by the plaintiff against defendant Morley Construction Company, and the Treasurer of the United States, in the Supreme Court of the District of Columbia, Holding an Equity Court, Equity Case No. 56486, and that final payment of said check is deferred until the rights of all parties can be determined; that a copy of said notice is hereto attached, and marked Exhibit "B".

That for said reasons the defendant Merchants Bank of Kansas City, Missouri, has not, and cannot, collect the amount due on the said check to the defendant Morley Construction Company, and that the defendant Morley Construction Company cannot receive the amount due on the said check for any purpose and that notwithstanding the pendency of the said suit in the District of Columbia and notwithstanding the said proceedings in the said court the plaintiff herein well knowing that it had by the said proceedings in the said Supreme Court of the District of Columbia, rendered it impossible for the Merchants Bank of Kansas City, Missouri, or the Morley Construction Company, to receive the said money, or to use it for any purpose, filed this suit in this court praying for relief, which it knew this court was without jurisdiction to grant, to prevent acts upon the part of the defendants which it knew the defendants were powerless to perform and that for said reason the plaintiff has prayed this court to grant the relief which its own acts have rendered unnecessary and that a decree granting the said defendant the relief it seeks would be futile and that for said reason this court is without jurisdiction to do a vain thing by granting the relief prayed for by the plaintiff.

3. Defendants admit the allegations contained in paragraph numbered 1 of the Complaint in Equity.

4. Defendants specifically deny the allegation in paragraph 2 of the Complaint "That the cause of action herein alleged is a petition in equity affecting property in Kansas City, Missouri, and in the Western District of Missouri" and specifically deny that the funds referred to in the [fol. 15] Complaint were deposited in the account of the defendant Morley Construction Company. Said defendants admit the other allegations set forth in said paragraph numbered 2 of the Complaint.

5. Defendants admit that defendant Morley Construction Company on the 27th day of April, 1933, gave to the said plaintiff the information contained in the last exhibit attached to the Bill of Complaint and that it became involved in the difficulties and disputes referred to in the said exhibit and specifically deny the allegations set forth in said paragraph numbered 5 of the Bill of Complaint, except as above admitted. And defendants state that plaintiff prepared Exhibit "A", attached to the Bill of Complaint, and also the letter of proposal by the defendant Morley Construction Company to the plaintiff, dated April 27, 1933, attached to the Bill of Complaint, and that said instruments were signed by Herbert F. Morley, acting as President of the Morley Construction Company.

6. Defendants admit that the Morley Construction Company entered into the contract referred to in paragraph numbered 6 of the Complaint, and admit that the said contract was entered into in order that the construction and completion of the buildings covered by said contract might proceed and be completed and admit that plaintiff and defendant Morley Construction Company deposited Five Thousand ($5,000.00) Dollars each to the account of Morley Construction Company with M & T Trust Company, and that said deposits were to be used towards the completion of said buildings and to be disbursed for said purpose under the joint control as alleged, and defendants deny that Morley Construction Company made or entered into any contract with the said plaintiff as to moneys or estimates to be deposited, save and except as specifically stated in said Exhibit and defendants admit the allegation that plaintiff further agreed to place in said account a sum sufficient to pay off all plasterers' claims unpaid and sufficient money to complete the plastering contract.

Said defendants further state that the plaintiff failed to comply with the said contract and allege that notwithstanding the sum of Thirteen Thousand Five Hundred ($13,500.00) Dollars was necessary to complete the plastering contract and that said sum was deemed reasonable and satisfactory and that plaintiff agreed to deposit said sum in said account to complete said plastering contract, yet the said plaintiff refused to deposit more than Fifty-seven Hundred ($5,700.00) Dollars and declined to deposit the Seventy-eight Hundred ($7,800.00) Dollars, additional, which the said plaintiff had contracted and agreed to deposit in said account.

[fol. 16] Defendants admit that the plaintiff deposited in said account a total of Ten Thousand Seven Hundred ($10,700.00) Dollars, but states that said sum was Seventy-eight Hundred ($7,800.00) Dollars less than the said plaintiff had so promised and agreed to deposit, and said plaintiff thereby breached said contract and thereby forfeited all rights thereunder.

7. These defendants deny that the defendant Morley Construction Company notified the Veterans Administration Department of the United States of America, to thereafter send to said M & T Trust Company, at Buffalo, New York, all estimates or money due on estimates or on the contract referred to in paragraph numbered 7 of its Bill of Complaint, for deposit to the account of the defendant Morley Construction Company under the terms of said supplemental agreement, and allege that defendant Morley Construction Company notified said Veterans Administration Bureau, Construction Division, as follows:

"Morley Construction Co., Batavia, N. Y.

April 28, 1933.

United States Veterans' Administration, Construction Division, Arlington Building, Washington, D. C.

GENTLEMEN:

In the payment of future estimate checks to the Morley Construction Company on the U. S. Veterans Hospital at Batavia, New York it is hereby requested that you forward checks to the Morley Construction Company, c/o Manu-

facturers and Traders Trust Company, Buffalo, New York, attention Edward W. Miller, Vice President.

Will you kindly acknowledge receipt of this communication and advise if this arrangement will be satisfactory to you?

Very truly yours, Morley Construction Company,
(S.) by H. F. Morley, President.

BDM:HS."

Defendants admit that the United States Veterans Administration, Construction Division, forwarded all the estimate checks excepting two thereafter issued by the Gov- [fol. 17] ernment to the said M & T Trust Company, of Buffalo, New York, for deposit, but denies that the amount so deposited in said trust company was disbursed in accordance with said supplemental agreement, but on the contrary the sum of Seventy-nine Hundred ($7,900.00) Dollars on deposit in said account and the said M & T Trust Company has failed and refused to give to the defendant Morley Construction Company its cancelled checks or a statement of the said account and has failed to discharge the function and duty contemplated by the said agreement with reference to said account.

8. Defendants admit that defendant Morley Construction Company completed and carried out its contract with the Government of the United States and with the plaintiff and did complete the erection and construction of the said buildings and improvements and that on or about the 19th day of July, 1933, the same were accepted by the United States Government, and a final settlement made by and between the defendant Morley Construction Company and the Government of the United States, about November 1, 1933, pursuant to which final settlement the sum of Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,-780.22) Dollars became due and payable to the defendant Morley Construction Company, but the defendants deny that said sum, under the said supplemental contract and direction to the United States Veterans Department should be forwarded to the M & T Trust Company for deposit, and that said supplemental contract did not require that it should be so forwarded.

9. Defendants deny that the said United States Veterans Administration, in accordance with said original con-

tract issued its check or warrant in the usual form upon the United States Treasury, dated November 13, 1933, and being warrant numbered 2,213,155, and payable to the order of the Morley Construction Company for the amount of Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars, but the said defendants state that on the 13th day of November, 1933, issued its check, same being numbered 2,213,115, directed to the Treasurer of the United States, payable to the order of Morley Construction Company for the sum of Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars.

Said defendants state that upon the issuance of said check, neither the said United States Veterans Administration, Construction division, or any employee or official thereof, through mistake, negligence or inadvertence, sent said check direct to defendant Morley Construction Company, in Kansas City, Missouri, instead of sending the [fol. 18] same in accordance with said supplemental agreement and said notice to the said M & T Trust Company, but on the contrary, the said check was intentionally sent by the said United States Veterans Administration, and its employees and officials, to the Morley Construction Company, in the discharge of their official duties.

Defendants specifically deny that the Morley Construction Company deposited said sum in its account with the defendant Merchants Bank of Kansas City, Missouri, subject to its own check.

10. Defendants state that they have no knowledge as to whether or not the plaintiff received information from the United States Veterans Administration, Construction Division, that it had by mistake sent said warrant direct to defendant Morley Construction Company, and therefore deny said allegation and defendants deny that said check was sent to defendant Morley Construction Company by mistake.

Defendants further deny that plaintiff demanded of defendant Morley Construction Company that it immediately sent the amount of the proceeds of said warrant to the said M & T Trust Company to be deposited and disbursed in accordance with said supplemental agreement, but on the contrary the defendants state that the plaintiff demanded of and from the said defendants that the said check be transferred and delivered to the plaintiff and in this con-

nection the defendants say that said M & T Trust Company has failed to account to the defendant Morley Construction Company for the moneys amounting to Seventy-nine Hundred ($7,900.00) Dollars now deposited with said M & T Trust Company, at Buffalo, New York, and that the said M & T Trust Company, for said reason, can not longer act as a depository of any funds of the said defendant Morley Construction Company, and has failed and refused to give said defendant a statement of its account, or its cancelled checks.

11. Defendants deny that the plaintiff, as surety, advanced for unpaid bills for labor and material entering into the construction of the said Veterans Hospital, in the sum of Ten Thousand Seven Hundred ($10,700.00) Dollars, but the said defendants allege that the plaintiff, in part performance only of the said supplemental contract deposited the said sum of Ten Thousand Seven Hundred ($10,700.00) Dollars and refused to deposit the further sum of Seventy-eight Hundred ($7,800.00) Dollars, under and by virtue of the said contract and that for said reason the said contract was broken by the said plaintiff to the great damage of the defendant Morley Construction Company.
[fol. 19] Defendants further deny that there are lawful bills or claims for labor approximately One Hundred Seven Thousand ($107,000.00) Dollars outstanding and deny that there remains in said deposit of the said M & T Trust Company under the terms of said supplemental agreement the sum of only Two Thousand ($2,000.00) Dollars and that the said allegations are untrue.

12. Defendants, and each of them, deny that under and by virtue of the terms of said supplemental agreement, it became and is entitled to have said final payment check so received by the defendant Morley Construction Company sent to said M & T Trust Company for deposit and disbursement.

13. Defendants deny that plaintiff, as surety upon the bond of defendant Morley Construction Company, was subrogated to the extent of Ten Thousand Seven Hundred ($10,700.00) Dollars, to the moneys or checks thereafter due from the United States Veterans Administration; or the United States Government, on said bond for said sum for the reason that it appears from the allegations of the petition

that it advanced said sum, pursuant to the terms of Exhibit "A", and not pursuant to the terms of said bond and that it breached the said contract, known as Exhibit "A", and for said reason is not entitled, either in law, or in equity, to any relief herein, under said contract, by reason of its advancement of the said sum.

14. Defendants admit that it is the duty of the Morley Construction Company to pay all lawful outstanding bills for labor and material furnished and used in the construction of said Government building, at Batavia, New York, but said defendants deny that plaintiff is entitled to have used for the purpose of paying such bills the said sum mentioned in the said check for the following reasons:

The plaintiff is entitled to have the Morley Construction Company pay such lawful bills, but it is none of the business of the said plaintiff from what source it derives the money from which the same are paid and the said defendants further deny that said sum has been improperly received by the defendant Morley Construction Company and deny that it has been improperly applied and converted to its own use, but the said defendants assert that the wrongful action of the plaintiff in preventing the Treasurer of the United States from paying the said check to the said defendant Morley Construction Company has prevented it from receiving the said money and has rendered the defendants, and each of them, powerless to use the said money for any purpose and powerless to enable the defendant Morley Construction Company to carry out its alleged [fol. 20] contract to deposit the said money with the M & T Trust Company.

15. Defendants, and each of them, deny that plaintiff is entitled to have a specific performance of said supplementary agreement and to have defendant Morley Construction Company ordered and required to forward said sum of Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars to M & T Trust Company, and deny that Defendant Morley Construction Company has received the said sum, either properly or improperly, but on the contrary that the plaintiff, by its wrongful acts in instituting the suit in the District of Columbia, and in instituting this suit, has wrongfully prevented defendant Morley Construction Company from receiving the said sum.

16. Defendants deny that the defendant Morley Construction Company is insolvent, or involved in other financial complications.

17. Defendants, and each of them, deny that plaintiff is entitled to have the money mentioned in said check impressed with a lien and impressed with a trust so that it can be disbursed and used in accordance with the terms of said supplementary agreement and deny that plaintiff is entitled to have it disbursed in accordance with its alleged right of subrogation and deny that defendant Morley Construction Company, will, or can, withdraw said money and use the same for improper purposes and deny that the Morley Construction Company can, or will, conceal the same so that said funds will not be available for proper purposes and said defendants deny that plaintiff has good reason to believe, and does believe, that defendant Morley Construction Company, unless restrained, will improperly convert or conceal such funds, and defendants deny that unless the said funds are so impressed with a trust or lien, and deny that unless defendant Morley Construction Company, and its officers, servants and agents are restrained and enjoined from withdrawing or disbursing said money, or any part thereof, for any purpose other than that covered by said supplementary agreement and unless said defendant Merchants Bank of Kansas City, Missouri, is restrained from permitting the withdrawal of said funds, or any part thereof, for any purpose, other than set out in said supplementary agreement, the plaintiff will suffer an irreparable loss, and defendants deny that plaintiff has no adequate remedy at law for any relief in the premises and said defendants allege that the plaintiff is not entitled to any relief and is not entitled to the relief which it seeks in this action.

[fol. 21] 18. Defendants allege that the actions of the plaintiff, in filing the said suits in the Supreme Court of the District of Columbia, and in this court, have subjected the defendant Morley Construction Company to an immediate multiplicity of suits and judgments and that Under Section 270, Title 40, U. S. C. A., no suit can be instituted against the plaintiff for any of the material or labor mentioned in the complaint, before six months have elapsed from the date of the final settlement between the Government of the United States and the defendant Morley Con-

struction Company and defendants further allege that the defendant Morley Construction Company has fully discharged its contract with the Government of the United States, so as to relieve the plaintiff from all liability on its said bond to the Government of the United States and if the said defendant Morley Construction Company were permitted so to do, it would now be in process of paying and collecting its debts and relieving the said plaintiff of liability on its said bond and that by reason of its action and conduct in the premises the said defendant Morley Construction Company has been prevented from proceeding with the reduction and extinguishment of liability on the said surety bond executed by the plaintiff.

Having thus made full answer to all the matters and things contained in the Bill styled "Complaint in Equity", the defendants pray that the said Bill be dismissed and for judgment for the costs of defendants, and each of them, in this behalf incurred.

Counter-Claim

And for its Counter-Claim against the above named plaintiff, the defendant Morley Construction Company herein reiterates and re-alleges all of the matters and things set forth in the preceding part of this Motion, Answer and Counter-claim, and further states that unless the plaintiff be directed and commanded by this court to dismiss the said suit or Bill of Complaint in Equity pending in the Supreme Court of the District of Columbia in Equity, aforementioned, and to have all proceedings in said suit annulled and for naught held, great and irreparable damage will result to this defendant and that this defendant will be unable to carry out its contracts, either with the plaintiff or with the other persons interested in the payment of their bills for labor and materials used in the construction of the said Veterans Hospital, at Batavia, New York, and that this defendant is threatened with litigation and suits by some of the persons whose bills are unpaid and to whom the said defendant is indebted and that unless this court immediately direct the said plaintiff to dismiss [fol. 22] its said action in the District of Columbia, and cause all proceedings in said suit to be annulled and for naught held, and dismiss this suit, and direct and enjoin the plaintiff from further interfering with this defendant,

and interfering with its use of the said check, and the amount of money called for therein, this defendant will be put to great and unnecessary expense and caused to suffer great and irreparable damage.

Wherefore, the defendant Morley Construction Company prays the court to enter its order directing the plaintiff to dismiss the said suit pending in the District of Columbia and to cease all proceedings which are now interfering with, or may hereafter interfere with, the use by the said defendant of the amount mentioned in the said check, to be discontinued and annulled and the Treasurer of the United States notified, and for such other and further relief as to the court may seem proper in the premises.

Morley Construction Company, by Herbert F. Morley, Its President. Merchants Bank of Kansas City, Missouri, by Hal R. Lebrecht, Its President. Buchholz & O'Donnell, Attorneys for Defendants.

Duly sworn to by Herbert F. Morley and Hal R. Lebrecht. Jurats omitted in printing

---

[fol. 23] EXHIBIT "A" TO ANSWER

Filed Nov. 25, 1933, Frank E. Cunningham, Clerk

In the Supreme Court of the District of Columbia Holding an Equity Court. Maryland Casualty Company, a Corporation, Baltimore, Md., Mills Building, Washington, D. C., Plaintiff, vs. Morley Construction Company, a Corporation, Kansas City, Missouri, William A. Julian, Treasurer of the United States, Treasury Department, 15th Street and Pennsylvania Avenue, Washington, D. C., Defendants. Equity No. 56486.

Bill of Complaint for Injunction

To the Supreme Court of the District of Columbia, holding an Equity Court:

The plaintiff, Maryland Casualty Company, which is a corporation, respectfully states as follows:

1. Plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of Maryland

and maintains an office and carries on business in the District of Columbia, and brings this suit in its own right.

[fol. 24] 2. Defendant Morley Construction Company is a corporation; plaintiff has no sufficient knowledge or information to form a belief, and therefore is unable to aver where said Morley Construction Company is incorporated. Said defendant is sued in its own right. Defendant William A. Julian is a citizen of the United States, now resident in the District of Columbia, is Treasurer of the United States of America and is sued herein in his said official capacity.

3. On, to-wit, August 1, 1932, defendant Morley Construction Company, which is engaged in the general contracting business, entered into a certain contract in writing with the United States of America for the construction, furnishing and completion by said defendant for the Government of the United States of a certain structure known as Veterans' Administration Hospital, New York, Main Building No. 1, Batavia, New York, and pursuant to the provisions of said contract the aforesaid defendant employed subcontractors upon the work aforesaid and commenced and proceeded therewith.

4. In compliance with the provisions of the statute in such case made and provided and, on, to-wit, August 1, 1932, said defendant Morley Construction Company, as principal, and the plaintiff herein as surety, made, executed and delivered to the United States of America a certain writing obligatory in the form of a bond to secure the performance by said Morley Construction Company of its aforesaid contract with the United States of America, by which said defendant and this plaintiff bound themselves to the United States of America in the penal sum of $275,000.00. Said writing obligatory was subject to certain conditions therein set forth, as follows:

"Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform

and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prose- [fol. 25] cution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue."

5. During the latter part of April, 1933, said defendant Morley Construction Company became financially embarrassed and was unable to pay the subcontractors and material men for work and materials which said subcontractors and material men had performed and delivered in connection with the completion of the government contract aforesaid and on, to-wit, April 28, 1933, plaintiff, at the instance and request of said defendant, loaned and advanced to said defendant the sum of $10,500.00, to be used by said defendant in connection with the completion of the contract aforesaid and, in consideration of said loan, said defendant, at the time aforesaid, entered into a contract with the plaintiff by the terms whereof all future payments to be made by the United States of America to said Morley Construction Company were agreed to be sent to said defendant in care of the Manufacturers and Traders Trust Company of Buffalo, New York, and said remittances were agreed to be disbursed and paid under the joint supervision and control of plaintiff herein and of said defendant and to be applied in payment of labor and material bills incurred in connection with the government contract aforesaid. Pursuant to this agreement, said defendant Morley Construction Company, by letter of April 28, 1933, requested and authorized the Veterans Bureau Administration of the United States Government, which said Bureau was in charge of the government work aforesaid, to forward all future payments in connection with the government work aforesaid to said Manufacturers and Traders Trust Company and thereafter and until, to-wit, November 13, 1933, said Veterans Bureau did, in fact, forward such payments as requested and au-

thorized, but on, to-wit, said November 13, 1933, by inadvertence and oversight, United States check No. 2,213,115 in the sum of $59,782.22, which sum represents the final payment of the United States Government upon the contract aforesaid, was sent by said Veterans Bureau direct to said Morley Construction Company at its office in Kansas City, Missouri, instead of being sent as authorized and directed as hereinbefore set forth. Said check has not been presented to the Treasurer of the United States for payment.

6. Defendant Morley Construction Company is indebted to divers persons who have supplied it with labor and materials, which were used in the performance of the aforementioned contract, in the sum of, to-wit, Ninety Thousand Dol- [fol. 26] lars ($90,000.00), and said defendant has not repaid to plaintiff the sum of Ten Thousand Five Hundred Dollars ($10,500.00) loaned it as aforesaid. Plaintiff, by virtue of being surety on the bond of said Morley Construction Company, as aforesaid, is obligated to pay all persons who supplied labor and materials to said Morley Construction Company on the aforesaid project.

7. Plaintiff says that it has a lien against said final payment of $59,780.22 to prevent the diversion or misapplication of said fund, and to require it to be paid out to such persons who are unpaid and have furnished labor and/or materials to said Morley Construction Company in the performance of the aforesaid contract. Plaintiff is informed and believes and therefore avers and will offer evidence tending to prove that defendant Morley Construction Company is insolvent and that it does not intend to utilize the said sum of $59,780.22 in the payment of said labor and material bills, but to divert the same to other purposes, and plaintiff says that it has no adequate remedy at law, and unless William A. Julian as Treasurer of the United States is enjoined from honoring and paying the aforesaid check when it is presented for payment, plaintiff will suffer irreparable loss and injury, and the sum of $59,780.22 will be diverted and misapplied.

Wherefore, the premises considered plaintiff prays as follows:

First. That the process issue out of this Honorable Court directing the defendants Morley Construction Company

and William A. Julian, and each of them, to appear and answer the exigencies of this bill, in accordance with law and the rules of this Court, and that publication be substituted for personal service of process as to any of said defendants who are beyond the District of Columbia and cannot be personally served with process.

Second. That the defendant William A. Julian, as Treassurer of the United States, be enjoined pendente lite and permanently from honoring and paying United States Government check number 2,213,115, in the sum of Fifty-nine Thousand Seven Hundred Eighty Dollars and Twenty-Two Cents ($59,780.22), and/or any other check to said Morley Construction Company in payment of work performed in the construction, furnishing and completion of Veterans' Administration Hospital, New York main building #1, Batavia, New York, and that a receiver or receivers be appointed by this Honorable Court to receive and disburse under the direction of this Court the balance due from the United States of America upon the contract in the bill of complaint described.

[fol. 27] Third. That defendant Morley Construction Company be required to deliver said government check No. 2,213,115, to such receiver or receivers as may be appointed herein to the end that the proceeds thereof may be disbursed in payment of the obligations of said Morley Construction Company in connection with the performance of its said contract with the Government of the United States.

Fourth. That such accountings may be ordered herein as may be necessary or proper for the purpose of ascertaining and directing the proper distribution of the balance due from the United States of America upon the contract in the bill of complaint described.

Fifth. That plaintiff may have such other and further relief as to the Court may seem necessary and proper, the premises considered.

Maryland Casualty Company, by George B. Robey.
Whiteford, Marshall & Hart, 815 15th Street, N. W., by Roger J. Whiteford, Attorney for Plaintiff.

DISTRICT OF COLUMBIA, ss:

George B. Robey, being first duly sworn, on oath says that he is agent in the District of Columbia for the Mary-

land Casualty Company, a corporation named as plaintiff in the caption of this suit; that affiant has authority to execute this bill of complaint on behalf of said corporation and has knowledge of the facts in the bill of complaint set forth. Affiant has read the aforegoing bill of complaint subscribed by him on behalf of said Maryland Casualty Company and knows the contents thereof and verily believes the facts therein stated to be true.

George Robey.

Subscribed and sworn to before me this 25th day of November, 1933. Margaret H. Raedy, Notary Public, D. C. (Seal.)

Filed Nov. 27, 1933, Frank E. Cunningham, Clerk

In the Supreme Court of the District of Columbia. Holding an Equity Court. Maryland Casualty Company, a Corporation, Mills Building, Washington, D. C., Plaintiff, vs. Morley Construction Company, a Corporation, [fol. 28] Kansas City, Missouri, William A. Julian, Treasurer of the United States, Treasury Department, 15th Street and Pennsylvania Avenue, Washington, D. C., Defendants. Equity No. 56486.

Rule to Show Cause

Upon consideration of the bill of complaint filed herein, it is

Ordered, by the Court, this 27th day of November, 1933, that defendant William A. Julian, as Treasurer of the United States, show cause in this Court, if any he can, on the 5th day of December, 1933, at ten o'clock, A. M., on said day, or as soon thereafter as counsel can be heard, why he should not be enjoined, pending the hearing of this cause upon its merits, from paying United States Government check number 2,213,115, for the sum of Fifty-nine Thousand Seven Hundred Eighty Dollars and Twenty-two Cents ($59,780.22), and why a Receiver or Receivers should not be appointed in this cause, to receive and disburse under the direction of this Court the balance due from the United States of America upon the contract between defendant Morley Construction Company and the United States of America for the construction, furnishing and com-

pletion by said defendant, for the United States Government of Veterans' Administration Hospital, New York, Main Building No. 1, Batavia, New York, as prayed in said bill of complaint.

Provided, that a copy of this rule be served upon said defendant at least two clear days before the return day hereof.

F. D. Letts, Justice.

Marshal's Return

Served a copy of the above rule on William A. Julian, Treasurer of U. S. by serving G. O. Barnes, Asst. Treas. 11-27-33 Personally.

Edgar C. Snyder, U. S. Marshal in and for the Dist. of Columbia, by E. J. Graves, Deputy U. S. Marshal. B.

[fol. 29] EXHIBIT "[illegible]" TO ANSWER

Federal Reserve Bank of Kansas City

Nov. 27, 1933.

Merchants Bank, Kansas City, Missouri.

Attention Mr. Lebrecht

GENTLEMEN:

Reference is made to our telephone conversation in connection with government check No. 2,213,115, dated November 13, 1933, for $59,780.22, drawn on the Treasurer of the United States by J. B. Schommer, Disbursing Clerk, Veterans Administration, symbol 11-500, to the order of the Morley Construction Company, which bears your endorsement of November 22, 1933.

We are today in receipt of a letter from the Treasurer of the United States advising that injunction proceedings have been filed by the Maryland Casualty Company against the Morley Construction Company and the Treasurer of the United States in the Supreme Court of the District of Columbia Holding an Equity Court, Equity Case No. 56486, and final payment of this check is deferred until the rights of all parties can be determined.

In view of the above the Treasurer has requested immediate credit covering this item and we are, therefor-, charging your account $59,780.22 today, and ask that you kindly return the enclosed photostatic copy after it has served its purpose.

Yours very truly,

E. P. Tyner, Assistant Cashier.

J.
Enc.

IN UNITED STATES DISTRICT COURT

REPLY TO JOINT ANSWER AND ANSWER TO COUNTER-CLAIM—
Filed September 24, 1934; Refiled September 27, 1934

I.

Now Comes the plaintiff, Maryland Casualty Company, and for its reply to the joint answer of defendants Morley Construction Company and Merchants Bank of Kansas City, Missouri, states:

1. Plaintiff in reply to paragraph 2 of said answer admits that defendant Morley Construction Company re- [fol. 30] ceived a check #2213115, dated November 13, 1933 for Fifty-nine Thousand Seven Hundred Eighty and 22/100 Dollars ($59,780.22), drawn on the Treasurer of the United States, by J. B. Scommer, Disbursing Clerk, Veterans Administration, Symbol 11-500, payable to the order of Morley Construction Company, but denies that said check was deposited by Herbert F. Morley, President of the Morley Construction Company, with the defendant Merchants Bank of Kansas City, Missouri, for collection, and deny that it was agreed by defendant Merchants Bank that when collected to give credit to Herbert F. Morley, Trustee, but state the fact to be that said check was endorsed by defendant Morley Construction Company and delivered to the said Merchants Bank of Kansas City in purchase of a cashier's check then drawn payable to the order of Herbert F. Morley as Trustee with the understanding that the same was to be delivered to Herbert F. Morley when the check in the usual course of business was cleared by said Merchants Bank.

Plaintiff further admits that defendant Merchants Bank forwarded said check through the usual channel for collection to the Treasurer of the United States and deposited the same to the account of the said Merchants Bank with the Federal Reserve Bank of Kansas City, Missouri.

Plaintiff further admits that thereafter and before said check was paid by the Treasurer of the United States, plaintiff filed a bill of complaint for injunction and rule to show cause on the 25th day of November, 1933 in the Supreme Court of the District of Columbia alleging in substance the same matters and things against defendant Morley Construction Company which were alleged in the bill of complaint herein, and admits that said check has not yet been paid by the Treasurer of the United States.

Plaintiff further admits that the Treasurer of the United States refused to honor said check or pay the same, but states that plaintiff had no information as to whether or not the said Treasurer of the United States refused to pay the same until the said suit in the District of Columbia was disposed of, and therefore denies the same.

Plaintiff further admits that after the bringing of such action in the District Court of the District of Columbia, defendant Merchants Bank of Kansas City, Missouri received from the Federal Reserve Bank of Kansas City, Missouri, a notice advising Merchants Bank that the Federal Reserve Bank was in receipt of a letter from the Treasurer of the United States as set out in defendants' said joint answer.

Plaintiff further admits that defendant Merchants Bank of Kansas City, Missouri has not and cannot collect the amount due on said check to the Morley Construction Com-
[fol. 31] pany, and that the defendant Morley Construction Company cannot receive the amount due on said check during the pendency of this action and during the pendency of said action in the District of Columbia, but denies that notwithstanding the pendency of said suit in the District of Columbia that the plaintiff herein well knowing that it had by said proceedings in said Supreme Court of the District of Columbia rendered it impossible for the Merchants Bank of Kansas City, Missouri or the Morley Construction Company to receive said money or to use it for any purpose, filed this suit in this Court praying for relief which it knew this Court was without jurisdiction to grant

and to prevent acts upon the part of the defendants which it knew the defendants were powerless to perform, and denies that for said reason the plaintiff has prayed this Court to grant the relief its own acts have rendered unnecessary, and denies that a decree granting said defendant the relief which it seeks would be futile, and denies that for said reasons this Court is without jurisdiction to grant the relief prayed for by the plaintiff.

2. Plaintiff for reply to paragraph 5 of said answer denies that the plaintiff prepared Exhibit "A" attached to the plaintiff's bill of complaint and also the letter of proposal by defendant Morley Construction Company to the plaintiff, dated April 27, 1933, attached to the bill of complaint, and state that said Exhibit "A" and said letter of proposal were jointly prepared by duly authorized representatives of the Morley Construction Company and by duly authorized representatives of the plaintiff.

3. Plaintiff for reply to paragraph 6 of said answer denies that plaintiff failed to comply with the contract referred to in said paragraph of said answer, and denies that the plaintiff breached said contract and forfeited all rights thereunder.

4. Plaintiff in reply to paragraph 7 of said answer admits that defendant Morley Construction Company sent to the United States Veterans Administration the letter set out in paragraph 7 of said answer, and in further answer to said paragraph denies that the sum of $7,900.00 was on deposit with the M & T Trust Company of Buffalo, New York, under the terms of said depository contract at the time of the filing of defendants' answer, and denies that the M & T Trust Company failed and refused to give to the Morley Construction Company its canceled checks or a statement of said account, and denies that said M & T Trust Company has failed to discharge the function and duty contemplated by said agreement.

[fol. 32] 5. Plaintiff in reply to paragraph 8 of said answer states that although it alleged in plaintiff's bill of complaint and admitted in said paragraph 8 of defendant's answer that the defendant Morley Construction Company completed and carried out its contract with the Gov-

ernment of the United States, and that the same was accepted by the United States Government, but alleges the fact now to be that the said Government of the United States now contends that the defendant Morley Construction Company has failed in 394 separate particulars in the fulfillment of its contract and has demanded of Morley Construction Company and of this plaintiff as surety upon its bond that said 394 defects be remedied, but does admit that after apparent completion of said building the Government of the United States on or about November 1, 1933, issued a check hereinbefore referred to in plaintiff's bill of complaint and hereinbefore referred to, payable to the Morley Construction Company in the sum of $59,780.22.

6. Plaintiff in reply to paragraph 9 of defendant's answer admits that the number of the check so issued by the United States Government was 2213115 instead of 2213155. For further answer to said paragraph 9, plaintiff denies that the said check was intentionally sent by the United States Veterans Administration and its employees and officials to the Morley Construction Company in the discharge of their official duties, but reiterate the allegations in plaintiff's bill of complaint that the same was so sent by mistake, negligence or inadvertence.

7. Plaintiff for reply to paragraph 10 of said answer denies that the plaintiff demanded of and from said defendants that the said check be transferred and delivered to the plaintiff, and denies that the M & T Trust Company has failed to account to the defendant Morley Construction Company for the moneys amounting to $7,900.00 then deposited with the M & T Trust Company, and denies that said M & T Trust Company has failed and refused to give said defendant a statement of said account or the canceled checks issued against the same.

8. Plaintiff for reply to paragraph 11 of said answer denies that the plaintiff breached the supplemental contract referred to in said paragraph, and denies that defendant Morley Construction Company was damaged by reason of any alleged breach of contract.

9. Plaintiff for reply to paragraph 13 of said answer denies that it breached the contract, Exhibit "A", and denies that it is not entitled either in law or equity to any relief herein.

[fol. 33] 10. Plaintiff for reply to paragraph 14 of said answer denies that the plaintiff was guilty of any wrongful action in preventing the Treasurer of the United States paying the said check to the said defendant Morley Construction Company, and denies that plaintiff has prevented the defendant Morley Construction Company from receiving said money and has rendered said defendants, and each of them, powerless to use said money for any purpose, and powerless to enable said defendant Morley Construction Company to carry out its alleged contract to deposit said money with M & T Trust Company, but on the contrary states that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract, and the plaintiff at all times since said action was and is now anxious and willing that the said money be deposited and disbursed in accordance with said contract, Exhibit "A".

11. Plaintiff for reply to paragraph 15 of defendants' answer denies that plaintiff was guilty of any wrongful act in instituting the suit in the District of Columbia and in instituting this suit, and denies that it has wrongfully prevented Morley Construction Company from receiving said sum of money referred to in paragraph 15 of said answer.

12. Plaintiff for reply to paragraph 17 of defendants' answer, denies the allegation therein that the plaintiff was not entitled to any relief and is not entitled to the relief which it seeks in this action.

13. Plaintiff for reply to paragraph 18 of defendants' answer denies that the acts of the plaintiff in filing the said suits in the District of Columbia and in this Court has subjected the defendant Morley Construction Company to an immediate multiplicity of suits and judgments as set out in said paragraph, and further denies that the defendant Morley Construction Company has fully discharged its contract with the Government of the United States so as to relieve the plaintiff of all liability under its bond to the Government of the United States, but alleges the fact to be that the said Government of the United States has and is now making the contention that the Morley Construction Company has failed in 394 particulars in the ful-

fillment of its contract, and has demanded of this plaintiff under its bond that either it require the Morley Construction Company to remedy such defects or that it, the plaintiff, do so itself. Said plaintiff further answering said paragraph, denies that the defendant Morley Construction Company if permitted to do so would be now in the process of collecting and paying its debts and of relieving the plain-[fol. 34] tiff of its liability on said bond, but states that the plaintiff at all times and now is ready and willing that said money be disbursed in accordance with said contract, Exhibit "A", in the payment of the liabilities and debts of the Morley Construction Company for labor and material used in the construction of said hospital at Batavia, New York. For further reply, plaintiff denies that by reason of any act of the plaintiff the defendant Morley Construction Company has been prevented from proceeding with the reduction and extinguishment of liability on said surety bond executed by the plaintiff.

Wherefore, plaintiff having fully replied to the answer filed herein by defendants, prays as in its amended bill of complaint it has prayed.

II.

Now Comes the plaintiff and for its answer to the counterclaim filed herein by the Morley Construction Company states:

1. The Morley Construction Company herein and in said counterclaim, contained in its amended answer, has reiterated, realleged and adopted without setting them out all of the matters and things set forth in the answer, of which said counterclaim is a part, and the plaintiff in answer to said petition reiterates, re-alleges and adopts all the admissions, denials and allegations heretofore made in its reply to said answer, the same as if each such allegation and counterclaim were specifically set out and the same as if each such admission, denial or allegation of said reply were herein specifically set out.

2. For further answer to said counterclaim, plaintiff denies that unless the plaintiff be directed and commanded by this Court to dismiss this suit or bill of complaint in equity pending in the Supreme Court of the District of Columbia in Equity and to have all proceedings in said

suit annulled and for naught held that great and irreparable damage will result to this defendant, and denies that by reason thereof this defendant will be unable to carry out its contracts, either with the plaintiff, or with the other persons interested in the payment of their bills for labor and materials used in the construction of the said Veterans Hospital at Batavia, New York, but alleges the fact to be that any restraint placed upon the defendants is by reason of the action of this Court, and states that the plaintiff has at all times and now is ready and willing to dismiss the said proceedings in the District Court of the District of Columbia if the defendant Morley Construction Company will agree that the funds so impounded may be received and [fol. 35] disbursed in accordance with Exhibit "A" attached to plaintiff's cross-complaint, and is willing upon the final determination of this action directing and ordering the distribution of said fund for the payment of labor and material bills on said Batavia Hospital job to dismiss the proceedings so pending in the District of Columbia.

Wherefore, plaintiff having fully answered the counterclaim of defendant Morley Construction Company, asks that the same be dismissed.

Harris & Koontz, Attorneys for Plaintiff.

Service of copy of foregoing reply acknowledged this 18th day of Sept., 1934.

—— ——, —— ——, Attorneys for Defendant.

Served copy of foregoing reply on Martin O'Donnell, Esq., of the law firm of Buchholz and O'Donnell, attorneys for defendants, this 18th day of September, 1934.

Harris & Koontz, by Harry F. Murphy, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Decree—Filed October 23, 1934

Now on the 27th day of September, 1934, this cause came on regularly to be heard, the plaintiff appearing by Spencer F. Harris and Paul G. Koontz, its attorneys, and the de-

fendants appearing by Martin O'Donnell and Andrew Ellison, their attorneys, and evidence was heard by the Court, and the Court being unable to complete such hearing, said cause was continued until the 28th day of September, 1934 for further hearing.

And on the 28th day of September, 1934, the hearing of said cause was resumed, the same parties by the same attorneys being present, and the hearing of evidence was completed, and the arguments of counsel being by the Court heard, said cause was by the Court taken under advisement.

Now on this 22nd day of October, 1934, the Court having heretofore fully heard and considered the evidence produced and having fully heard and considered the arguments of counsel, and being fully advised in the premises, finds that the plaintiff is not entitled to a specific perform-[fol. 36] ance of the contract under date of April 28, 1933 introduced in evidence, and finds that the complainant is not entitled to be subrogated to any of the funds arising out of the contract between defendant Morley Construction Company and the United States Veterans Department by reason of the advancement by plaintiff to the defendant Morley Construction Company of the sum of $10,740.00; and as to the prayer for exoneration, the Court finds the issues in favor of the plaintiff and against the defendant Morley Construction Company and that the plaintiff is entitled to be exonerated by defendant Morley Construction Company from all liability on its bond as surety for said defendant on its contract for the construction of the Batavia, New York, United States Veterans Hospital referred to in evidence.

Now, therefore, it is ordered and adjudged by the Court that the defendant Morley Construction Company exonerate and hold harmless the plaintiff Maryland Casualty Company and that said Morley Construction Company promptly pay all labor and material claims arising out of or in connection with the Batavia, New York, United States Veterans Hospital contract and that the said defendant apply to such payment any and all monies it now has or which it may hereafter realize from the performance of the hospital contract aforesaid, including the proceeds of its claim or claims against the United States on account of

such contract and including the sum of $59,780.22 represented by the United States Treasury Warrant No. 2213155, dated November 13, 1933, or the proceeds of any other warrant or warrants which may be issued in place of said warrant, and including all other assets of the defendant Morley Construction Company which it now has or may hereafter acquire insofar as the same may be necessary for the payment of labor and material claims incurred in the performance of said hospital contract, except only any part or portion of proceeds from the performance of any other construction contract performed by defendant Morley Construction Company which may be required for the payment of labor and material claims incurred in the performance of such other construction contract or contracts.

It is further ordered that defendant Morley Construction Company shall deposit the proceeds from said United States Treasury Warrant No. 2213155 in some bank and such deposit shall be designated as a special trust fund for the payment of bills for labor and material used on the United States Veterans Hospital in Batavia, New York.

It is further ordered and adjudged that the defendant Merchants Bank of Kansas City, Missouri relinquish any claim which it may have to the funds aforesaid, whereupon said defendant shall be dismissed from this cause.

[fol. 37] It is further ordered and adjudged that the cross-bill of defendant Morley Construction Company be dismissed.

It is further ordered and adjudged that the defendant Morley Construction Company pay the costs of this action, for which let execution issue.

Merrill E. Otis, Judge.

Rec'd copy this 20th day November, 1934. Andrew Ellison, Attorney for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR REHEARING—Filed October 19, 1934

To the Honorable Merrill E. Otis, Judge of the District Court of the United States for the Western Division of the Western District of Missouri:

The petition of defendants for a rehearing in the above entitled cause shows:

1st. On the 27th day of November, 1933, plaintiff herein filed its bill of complaint alleging that by virtue of a contract dated April 28, 1933, between defendant Morley Construction Company and plaintiff, plaintiff was entitled to have all moneys thereafter received from the Government of the United States by the Defendant Construction Company for performance of a contract to build a certain Veterans Hospital at Batavia, New York, deposited in a joint bank account with the M & T Trust Company, at Buffalo, New York, subject to the control of the parties thereto; that plaintiff was entitled, as a surety upon a bond jointly executed by the Defendant Construction Company and plaintiff to be subrogated to all of the rights of the said Defendant Morley Construction Company against the Government and also that the said plaintiff was entitled to decree requiring defendant Morley Construction Company to apply all moneys due said defendant Morley Construction Company from the Government to the exoneration of said defendant from liability on said bond, and said plaintiff, in the said action, prayed specific performance of said alleged contract and prayed to be subrogated to the rights of the said plaintiff and prayed for such exoneration.

2d. On the 6th day of January, 1934, defendants herein filed their answer which, in substance, alleged that the plaintiff had failed to carry out the alleged contract on its part; that the said contract provided for the deposit in the [fol. 38] joint account only of the amounts received from the Government on estimate checks and that the amount of a warrant for Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars was not included in the contract; that the creditors on the bond referred to in the petition were not entitled at the time of filing the suit to demand or to compel or to receive immediate pay-

ment from the surety; that the defendant had paid nothing under and by virtue of its said bond and that the said defendant had before the institution of this suit, brought a suit in the Supreme Court of the District of Columbia praying for the same relief as in this case and caused said court to issue an injunction to the Treasurer of the United States enjoining said Treasurer from paying the money mentioned in said warrant to the Defendant Morley Construction Company and that said Defendant Morley Construction Company was prevented from receiving the amount due to it from the Government, by virtue of performance of the contract to build the said Hospital at Batavia, New York, and that for said reason the said plaintiff could not have the relief it prayed. The answer also prayed for dismissal on the ground that there was no equity in the bill. A counterclaim prayed for the dismissal of the suit in the Supreme Court of the District of Columbia.

3d. On the 2nd day of October, 1934, this court rendered a decision herein and filed an opinion and findings of fact and conclusions of law and directing plaintiff's counsel to prepare and submit for approval and entry a decree requiring the defendant Morley Construction Company to use all of its assets to pay the labor and material claims arising in connection with the Batavia contract, for which the plaintiff is liable under its bond, and to apply to such payment any money it has or will realize from assets now possessed by it including its claim against the United States on account of that contract.

4th. Said defendants state that the said decision is erroneous and void for the following reasons, to-wit:

A. Because it appears from the opinion, findings of fact and conclusions of law filed in this cause and also from the evidence that plaintiff failed to carry out its contract with defendant Construction Company; that for said reason this court denied to plaintiff the relief of specific performance prayed by plaintiff and thus and thereby found that the said plaintiff had itself failed to do equity to the said defendant Construction Company and that it failed to come into this court with clean hands; that at the time plaintiff filed its suit in this court its failure to perform said contract on plaintiff's part affected the legal relations of the

[fol. 39] parties to this action with reference to their rights in favor of and against each other under the said bond; that the relief of specific performance so sought in its bill of complaint was so connected with reference to the subrogation and exoneration sought and said conduct of the said plaintiff so affected the legal relations of the parties with reference to the issues presented by the pleadings that this court was without jurisdiction or power to grant the plaintiff any equitable relief in this action; that for said reason the decision is erroneous and void; that the only jurisdiction, power and authority which remained in this court after having found that plaintiff had so violated its contract and that its hands were unclean was to dismiss its bill and to order it to dismiss its like bill pending in the Supreme Court of the District of Columbia.

B. The evidence at the trial disclosed that the defendant Construction Company has a valid claim amounting to about Twenty Thousand ($20,000.00) Dollars against the New Amsterdam Casualty Company, a corporation, which claim against said New Amsterdam Casualty Company is valid and enforcible; that said claim is based upon the failure of said New Amsterdam Casualty Company to pay the amount due by it to the defendant Morley Construction Company under the terms and conditions of a bond executed by said New Amsterdam Casualty Company and a sub-contractor named Rupp by reason of the breach by said Rupp of his sub-contract, which breach occasioned damage to said Morley Construction Company in the sum of about Twenty Thousand ($20,000.00) Dollars; that the decision of this court requiring the Construction Company to use all moneys that may come into its hands only to pay said labor and material claims will prevent defendant Morley Construction Company from bringing an action against said New Amsterdam Casualty Company to recover of and from said New Amsterdam Casualty Company the said sum of Twenty Thousand ($20,000.00) Dollars; that said decision will prevent said defendant Morley Construction Company from using any money to defray the necessary expenses, including costs and counsel fees, incident to the prosecution of the said claim.

Said defendants further state that the defendant Morley Construction Company has a somewhat similar claim on a bond issued by the National Surety Company to a sub-con-

tractor of the said defendant on said Batavia buildings, by reason of the breach of his contract by the Plastering Contractor; that said defendant is informed and believes that the National Surety Corporation received without consideration, or adequate consideration, the greater part of [fol. 40] the assets of the National Surety Company and that said National Surety Corporation is liable to said defendant Morley Construction Company for the amount of said claim and that said defendant is informed and believes and therefore alleges that it cannot recover on either of the said bonds unless it engaged counsel and unless it has sufficient funds to pay the costs, expenses and counsel fees incident to the said litigation and that if said decision of this court be permitted to stand it will prevent said defendant Morley Construction Company from collecting the said claims.

That said defendants have been informed and believe that the bonds issued by the said New Amsterdam Casualty Company and said National Surety Company contain provisions providing that no suit or action shall be brought thereon more than one year after the completion of the contract and that the final settlement made by and between the Government of the United States and defendant Morley Construction Company was made on the 9th day of November, 1933, and that if said decision be not set aside, and said suit in the Supreme Court of the District of Columbia be not dismissed, the rights of said defendant Morley Construction Company to recover on said bonds may be barred and said defendant caused to lose said sums of Forty Thousand ($40,000.00) Dollars. That by the said decision the said defendant Morley Construction Company has been deprived of its property without due process of law, in violation of the command of the 5th Amendment to the Constitution of the United States.

C. At the time of filing the petition defendant Morley Construction Company had not and never had breached its obligations to the surety in any respect. It was seeking to use the money mentioned in the said warrant for the payment of the obligations for which the surety company is now liable; that no creditor was entitled to demand immediate payment from the plaintiff on its bond as surety for the Defendant Morley Construction Company until after May 9, 1934, and no person for whose benefit the

said bond was executed was authorized or entitled before said date to receive from the said Maryland Casualty Company any sum now due from it on the said bond; that at the time it brought this suit plaintiff was not authorized to and was disabled from paying to any such creditor any sum, or in any way to interfere with the right of the defendant Morley Construction Company to transact its business in its own way; that by the filing of the said suit and the suit in the District of Columbia the said plaintiff disabled the defendant Construction Company from carrying out its obligations to use the money mentioned in the [fol. 41] United States warrant referred to in the pleadings in the discharge of said obligations and that the acts and conduct of plaintiff in instituting and prosecuting this suit were wholly unwarranted and unnecessary and that for all of the foregoing reasons the said plaintiff was not entitled to the high relief of exoneration awarded to it by the decision herein and that said decision has deprived defendant Morley Construction Company of its property without due process of law:

D. The evidence failed to show that the indemnity accepted by plaintiff on its surety bond was insufficient.

E. The court was without jurisdiction to grant the relief awarded by its decision, judgment and decree, for the reason that the alleged creditors of the said defendant Morley Construction Company and the persons to whom the plaintiff might become liable on its said bond after the 27th day of November, 1933, were not parties to this action so that the court was without power or jurisdiction to ascertain the amount due to each one of the said creditors and the court was without jurisdiction to order defendant Morley Construction Company to pay to unknown persons unascertained amounts; the decision of the court is unenforcible for the said reason.

F. The opinion and findings disclose that all of the money due to the defendant Morley Construction Company from the Government is held by the Treasurer of the United States in obedience to the writ of injunction issued from the Supreme Court of the District of Columbia and that the defendant Morley Construction Company cannot receive any part of the money due to it from the United States Government.

G. Though plaintiff was directed to prepare a decree in this cause by the opinion heretofore herein filed on the 2nd day of October, 1934, yet the said plaintiff has failed and omitted to have any decree presented to this court and signed by this court and that for said reason the said plaintiff has waived any right to a decree or judgment in this cause.

H. The court erred in failing to find the facts requested on behalf of defendants.

I. The court erred in failing to adopt the conclusions of law requested on the part of defendants.

J. The court erred in sustaining plaintiff's objection to the offer of defendants to prove that plaintiff had before the trial of this cause filed an answer in the United States Court, at Buffalo, New York, in a suit brought by the United States for the benefit of the use plaintiffs on the [fol. 42] bond referred to in the Bill of Complaint, in which answer said plaintiff denied that it was liable on said bond to anybody.

K. The court erred in that over the objection of the defendants, it admitted oral evidence tending to show that the provision in the contract of April 28, 1933, providing that defendant Morley Construction Company should deposit in the alleged joint account all moneys and estimates thereafter received from the Government because of said work by which oral evidence attempted to show that the contract included the amount referred to in the final voucher, to-wit: Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars, and this for the reason that said contract was not ambiguous and plainly referred to the work as the work to be thereafter completed.

L. The court erred in making the following finding of fact, included in Finding of Fact No. 2:

"It was intended and understood by the parties to the agreement, and it was a part of that agreement, that the moneys received from the United States to be so deposited should include the final payment under the contract made by the United States to the Construction Company, as well as all other payments under the contract made by the United States after April 27, 1933."

M. The court erred in including in Finding of Fact No. 7 the finding that the Casualty Company had reason to apprehend that it was the intention of the Construction Company to use the proceeds of the warrant referred to in Finding of Fact No. 4 for the purposes other than the payment of labor and material claims under the Batavia contract.

N. The court erred in Conclusion of Law numbered 3, for the reason that under the law and the evidence the plaintiff was not entitled to decree requiring the defendant to pay the labor and material claims arising in connection with the Batavia contract for which the plaintiff is liable as surety and so to exonerate the plaintiff.

O. The court erred in its conclusion of law numbered 4 to the effect that the defendants' cross-bill should be dismissed for the reason that under the pleadings and the evidence the defendants were entitled to the relief prayed in the said cross-bill.

P. That defendants have been informed and believe and therefore allege that in a suit on the bond of plaintiff as surety now pending in the District Court of the United States for the Western District of New York, excessive [fol. 43] claims have been filed against the defendant Morley Construction Company and plaintiff in said suit and that by the findings and decision herein and by reason of the acts and conduct of the plaintiff in causing the issuance of the injunctions herein and in the Supreme Court of the District of Columbia and in causing this court to render the decision herein, said defendant Construction Company is, and will be, unable to use its funds to defend against said claims, and hence cannot pay the expenses of counsel or the necessary expenses incident to the defense against the said excessive claims and if said defendant Morley Construction Company be not permitted to receive and use its funds to defend against the said excessive claims, the said defendant Morley Construction Company will sustain losses, the amount of which defendants are unable to state.

Wherefore, the petitioner prays that this court will grant a rehearing of said cause on such terms as to this court shall seem just as to the feature of the said cause, granting the relief to plaintiff and said defendant Morley Con-

struction Company prays the court to modify its opinion, decision and findings by directing the dismissal of the Bill of Complaint and by directing the plaintiff to dismiss the action mentioned in the opinion of the court in the Supreme Court of the District of Columbia and grant to said defendant such other and further relief as to the court may seem proper.

Dated October 19th, 1934.

Martin J. O'Donnell, Andrew Ellison, Attorneys for Defendants.

Duly sworn to by Herbert F. Morley. Jurat omitted in printing.

[fol. 44] Received copy of foregoing this 19th day of Oct., 1934.

Harris & Koontz, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING PETITION FOR REHEARING—Filed February 26, 1935

Defendants petition for a rehearing in the above entitled matter having been duly considered by the Court, and the Court being fully advised in the premises, is by the Court overruled. It Is So Ordered.

Merrill E. Otis, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 19, 1935

To Whom It May Concern and To The Above Named Plaintiff, or Harris & Koontz, Its Attorneys of Record:

You will please take notice that defendants, Morley Construction Company, a corporation, and Merchants Bank of Kansas City, Missouri, a corporation, feeling aggrieved by

the judgment rendered and entered in the above entitled cause, on the 26th day of February, 1935, do appeal from said judgment to the United States Circuit Court of Appeals for the 8th Circuit, a copy of Defendants' application for appeal is hereto attached.

Buchholz & O'Donnell, Attorneys for Defendant.

Service of a true copy of within and foregoing notice of appeal and also copy of application for appeal acknowledged and accepted at Kansas City, Missouri, this 19th day of April, 1935.

Harris & Koontz, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 19, 1935

The above named defendants, Morley Construction Company, a corporation, and Merchants Bank of Kansas City, Missouri, a corporation, feeling aggrieved by the judg-[fol. 45] ments, orders and rulings of the court in the above entitled cause, made and entered on the 26th day of February, 1935, do hereby appeal from the said judgment, order and ruling and decision overruling defendants' Motion for Rehearing in said cause and also the said defendants feeling aggrieved by the judgments, orders, rulings and decisions of the court in the above entitled cause, made and entered on the 23rd day of October, 1934, with reference to which orders the said Motion for a Rehearing was directed and to set aside which orders, judgments, rulings and decisions of the court the said Motion for Rehearing was filed, in which this court dismissed the said defendants' Counter-Claim, and in which the court found that the defendants were entitled to the relief of exoneration, to the United States Circuit Court of Appeals for the 8th Circuit, for the reasons set forth in the Assignments of Error and said defendants pray that their appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents on which said judgments were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 8th Circuit,

under the rules of said court in cases made and provided.

Defendants present herewith their appeal bond in the sum of Five Hundred ($500.00) Dollars, that being the amount fixed by the court as the appeal bond herein, and pray that said bond may be approved.

Buchholz & O'Donnell, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed April 19, 1935

Now comes Morley Construction Company and Merchants Bank of Kansas City, Missouri, and each of them, defendants herein, and say that the judgment and order herein entered on the 26th day of February, 1935, also the order and judgment entered herein on the 23rd day of October, 1934, in the above entitled cause are erroneous and against the just rights of the said defendants, and each of them, for the following reasons:

(1) Because the court erred in overruling the defendants' Motion to Dismiss the plaintiff's petition at the trial.

(2) Because the court overruled the defendants' Motion to Dismiss the plaintiff's petition before the trial.

(3) Because the court erred in refusing to dismiss the plaintiff's petition at the close of the evidence.

[fol. 46] (4) Because the court erred in overruling, over defendants' objections and exceptions, defendants' Motion for a rehearing.

(5) Because the court erred in holding, over defendants' objections and exceptions, that as a matter of law the plaintiff was entitled to judgment in its favor upon the pleadings and evidence in said cause.

(6) Because the court erred in holding that plaintiff, Maryland Casualty Company, as surety, was entitled to a judgment directing the defendant Morley Construction Company to exonerate the said plaintiff, notwithstanding this suit was filed herein on the 27th day of November,

1933, at which time there was no liability existing in favor of any obligee or creditor on the bond of the said surety against the said plaintiff and could not be before the 9th day of May, 1934.

(7) Because the court erred in holding that notwithstanding the court found that the hands of the plaintiff were unclean in that the said plaintiff in the said action brought a suit for specific performance of a contract with reference to matters involved in this suit, and this court found that the said plaintiff was, itself, guilty of failure to carry out the contract which it sought to have specifically enforced and its hands were, therefore, unclean with reference to all the relief sought in the said suit.

(8) Because the court erred in that notwithstanding the suit of the plaintiff was based upon a charge of moral turpitude against the defendant Morley Construction Company, and its officers, and that said charge was without foundation and found that the said charge was untrue, yet the court erred in failing to hold that by making the said charge against the said defendant Morley Construction Company, and its officers, the plaintiff did an act which made its hands unclean and precluded the plaintiff from getting any relief in a court of equity in this case with reference to the subject matter of the transaction involved in this suit.

(9) Because the court erred in holding that the plaintiff was entitled to the relief for exoneration in this case and this notwithstanding that there was no existing liability in favor of any person or creditor against the plaintiff as surety at the time that this suit was filed.

(10) Because the court erred in refusing to dismiss the plaintiff's bill and in directing that the defendants go hence without day and have their costs of and from the plaintiff.

[fol. 47] (11) Because the court erred in that notwithstanding it found that the plaintiff was not entitled to the relief of specific performance of the alleged contract and notwithstanding the court found that the plaintiff was not entitled to subrogation for the reason that it had paid and expended nothing as surety for the benefit of the defendant Morley Construction Company and notwithstanding it

had found there was no liability upon the part of said surety to any creditor of the said Morley Construction Company at the time of filing this suit or to any obligee named in the bond referred to in the plaintiff's bill of complaint, yet the court granted plaintiff the relief of exoneration.

(12) Because the court erred in permitting an examination of defendants' witnesses by the plaintiff on matters concerning which they had not been examined by the defendants.

(13) Because the court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff over the objection of the defendants.

(14) Because the court erred in sustaining objections to competent, relevant and material evidence offered by the defendants over the objection of the defendants, and each of them.

(15) Because the plaintiff herein brought this suit against defendants upon the ground that it was a surety for the defendant Morley Construction Company and by the bringing of this action violated its contract of suretyship and prevented the said defendant Morley Construction Company, its principal in the alleged bond, from carrying out its contracts with the obligees of said bond and thus and thereby breached and violated its contract of suretyship and forfeited all right to relief against its said principal, the said Morley Construction Company, or its officers, or the alleged indemnitors on the bond of the said surety company.

Wherefore, defendants, and each of them, because of each and all of the errors herein specified, pray that the judgments and orders entered against them herein on the 26th day of February, 1935, and on the 23rd day of October, 1934, be reversed at plaintiff's costs.

Buchholz & O'Donnell, Attorneys for Defendants.

[File endorsement omitted.]

[fols. 48 & 49] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed April 19, 1935

Now on this 19th day of April, 1935, there is presented to this court the application of defendants Morley Construction Company and Merchants Bank of Kansas City, Missouri, praying for the allowance of an appeal herein to the United States Circuit Court of Appeals for the 8th Circuit and it appearing to the court that there has been filed with said application for appeal an assignment of error, setting forth and apart, each error intended to be urged and it further appearing that a good and sufficient bond in the sum of Five Hundred ($500.00) Dollars, as an appeal bond, this being the amount of the appeal bond fixed by the court, it is therefore

Ordered by the court that an appeal be, and the same is, hereby allowed said defendants, as provided by law to the United States Circuit Court of Appeals for the 8th Circuit to review the proceedings and judgments in this case, whereby a judgment was rendered in favor of the plaintiff and against the defendants on the 23rd day of October, 1934, and wherein a judgment and order were rendered in this case on the 26th day of February, 1935, overruling the motion for a rehearing of defendants; that citation issue, as provided by law; that a full transcript of the proceedings be by the clerk of said court presented and filed with the clerk of the United States Circuit Court of Appeals for the 8th Circuit, and the appeal bond herein tendered is hereby approved.

It is further ordered that the defendants be, and they are hereby, given until on or before sixty (60) days from this date in which to file a bill of exceptions herein, and transcript of the evidence herein.

Done at Kansas City, Missouri, this 19th day of April, 1935.

Merrill E. Otis, District Judge

[File endorsement omitted.]

Bond on appeal for $500.00, approved and filed April 19, 1935, omitted in printing.

[fol. 50] IN UNITED STATES DISTRICT COURT

NOTICE OF FILING PRÆCIPE FOR TRANSCRIPT AND ELECTION AS TO PRINTING—Filed April 19, 1935

To Maryland Casualty Company, a corporation, and Harris & Koontz, its Attorneys of Record:

Please take notice that on the 19th day of April, 1935, the undersigned filed with the Clerk of this Court a praecipe for the record to be transmitted to the United States Circuit Court of Appeals, Eighth Circuit, on appeal sued out in the above cause, copy of which præcipe is herewith served on you.

You are further notified that on the 19th day of April, 1935, the undersigned filed with the Clerk of this Court an election as to printing, designating the Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, as the person under whose supervision the printing on the appeal of the above cause shall be done, a copy of which election as to printing is herewith served on you.

Dated this 19th day of April, 1935.

Buchholz & O'Donnell, Attorneys for Appellant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed April 19, 1935

To The Clerk of The Above Court:

You will please include in the record herein, the following portions of the record:

1st. All record entries.

2nd. Plaintiff's amended petition.

3rd. Defendants' answer to the plaintiff's amended petition.

4th. Plaintiff's reply.

5th. Order, judgment and decree of the court denying plaintiff the relief of specific performance and the relief

[fol. 51] of subrogation and granting plaintiff the relief of exoneration.

6th. Defendant's petition for a rehearing.

7th. Defendant's notice of appeal with acknowledgment of service.

8th. Defendants' assignments of error.

9th. Bond for appeal.

10th. Order allowing appeal.

11th. Citation with service.

12th. Transcript of evidence.

13th. Election to have transcript printed by Clerk of the District Court.

14th. This præcipe.

15th. Certificate of the clerk authenticating the record.

Buchholz & O'Donnell, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING—Filed April 19, 1935

The Defendants above named hereby elect to have the Clerk of the Court of the District of the United States for the Western Division of the Western District of Missouri, at Kansas City, supervise the printing herein on appeal of this cause.

Buchholz & O'Donnell, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING TIME TO FILE TRANSCRIPT OF EVIDENCE—Filed April 19, 1935

Now on this day, the defendants are allowed forty (40) days from this date in which to file a transcript of the evidence.

Dated April 19, 1935.

Merrill E. Otis, District Judge.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS—Filed May 22, 1935

Now on this day for good cause shown the time in which to file the bill of exceptions herein is extended 40 days from this date.

Merrill E. Otis, Judge.

May 22, 1935.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed May 22, 1935

Now on this day for good cause shown, the time in which to file the transcript of the record in the United States Circuit Court of Appeals is hereby enlarged 40 days from this date.

May 22, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS AND TRANSCRIPT—Filed June 29, 1935

Now on this day for good cause shown the time in which to file the bill of exceptions and transcript herein is extended 40 days from this date.

June 29th, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed June 29, 1935

Now on this day the time in which the Appellant may file transcript in the Appellate Court is hereby extended forty days from this date.

June 29, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS AND TRANSCRIPT—Filed July 30, 1935

Now on this 26th day of July, 1935, the time in which to file the bill of exceptions and Transcript herein is extended forty days from August 1st, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed July 30, 1935

Now on this 26th day of July, 1935, the time in which the Appellant may file transcript in the Appellate Court is hereby extended forty days from August 1st, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER, EXTENDING TIME TO FILE BILL OF EXCEPTIONS—Filed September 7, 1935

Now on this day for good cause shown the time in which to file the bill of exceptions and transcript herein is extended 40 days from this date.

September 7, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed September 7, 1935

Now on this day the time in which the Appellant may file transcript in the Appellate Court is hereby extended forty days from this date.

September 7, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Statement of Evidence—Filed September 23, 1935

Be It Remembered:

That all the evidence herein was oral with the exception of such exhibits as are included in this statement.

[fol. 54] On Thursday, September 27, 1934, the above entitled cause came on regularly for trial herein before the Honorable Merrill E. Otis, District Judge.

Thereupon, HERBERT F. MORLEY being called as a witness by plaintiff testified that he was President of the Morley Construction Company, and had been connected with it since its incorporation. The company was incorporated

for Ten Thousand Dollars ($10,000.00) all paid in in cash. The capital stock had never been increased. The corporation never had a record book showing the assets of the corporation. The only record in that connection was the Articles of Incorporation.

"Q. Don't you carry a book account showing the assets and liabilities of your company?

A. No book. The only record that we have is the money in the bank."

The witness testified that the corporation secured information for its income tax statements from the records on what it paid out on the jobs. It had no copy of a statement of assets and liabilities. The only money added to the capital of the corporation was Five Thousand Dollars ($5,000.00), put in at the time the contract sued on was made. It was borrowed by the Corporation and constituted a liability of the Corporation.

"Q. What assets did it have on the 27th day of November, 1933?

Mr. O'Donnell: If the Court please, we object for the reason that the relevancy of that question doesn't appear at this time.

The Court: Overruled.

A. The final payment due on the Batavia, New York job."

In addition to that the company had a bank balance of between $8,000.00 and $10,000.00 in the M & T Trust Company, and claims against either three of four defunct and defaulting casualty companies and a claim against the government involving $1,130.00, growing out of the Batavia job.

The witness could not state what the liabilities were without checking the record, but stated that the outstanding bills for labor and material were in the neighborhood of $95,000.00. The corporation had a list of those labor and material claimants and the witness had checked them from time to time.

"Q. Have you an up-to-date list with you?

A. Yes, sir.

Q. May I see it?

A. It is there in the records."

[fol. 55] (Which said list, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 1, EFM".)

The witness testified that this list represented a total unpaid labor and material bills as of the present date. That the list represented what the corporation records showed as compiled by the office superintendent, and it was a complete list; that it did not coincide with the amount that the claimants were demanding as some claimants were claiming more than shown by the record, but that the amounts were correct according to the terms of the contracts between the Corporation and the materialmen and contractors.

"Mr. Harris: We offer Exhibit 1 in evidence."
Said Exhibit is as follows:

"PLAINTIFF'S EXHIBIT 1

Batavia, New York, Job Accounts

Concrete Engineering Co.	$6,359.18
American Terra Cotta Co.	2,986.67
Lackawanna Steel Construction Co.	1,303.46
Decatur Steel & Iron Co.	4,032.65
McPhillips Mfg. Co.	10,921.90
Russel-Erwin Mfg. Co.	7,895.06
Fred J. Burt	562.85
Olson Granite Co.	1,215.78
Johnson Roofing & Sheet Metal Works	6,501.04
Turner Resilient Floors Co.	7,300.00
C. H. Patek—sub-contractors	5,993.88
Rust Engineering Co.	232.83
The Logan Co.	202.90
American Builders Supply Co.	1,568.76
Rochester Stationery Co.	2,564.73
Swenson Stone Co.	733.22
Genessee Stone Product Co.	1,913.04
Ghiandoni & Associates	1,193.42
Planmondon-Gabriel Co.	6,481.76
J. J. Luraschi	158.24
Toledo Plate & Window Glass Co.	898.72

"Plaintiff's Exhibit 1—Continued

National Cleaning & Tuckpointing Co.	291.46
A. Palmeri & Co.	1,060.83
Harvard Tree & Shrub Co.	625.00
Milton Bemis	50.00
State Steel Co.	900.00
Goldsmith Metal Lath Co.	875.85
Patton Clay Mfg. Co.	769.59
John Schutt Jr.	170.80
[fol. 56] Genessee Lumber Co.	362.53
Fred Salway	374.39
Casey Carting Co.	133.75
U. S. Gypsum Co.	1,216.11
Central Clay Products Co.	1,992.14
Batavia Lumber & Coal Co.	252.95
Bar & Creelman	77.75
Globe Plaster Co.	71.27
Hollenbeck Testing Lab.	50.00
Carlton Sleight	46.51
John Glade & Son	28.62
Riders Drug Co.	19.25
Batavia Lumber & Coal Co.	2,794.45
Hudson Plastering	7,573.03
Niagara Lockpost Power Co.	14.97
	$90,771.34"

Plaintiff's Exhibit 2 was marked for identification by the reporter "Plaintiff's Exhibit 2 EFM".

"Mr. Harris: Now, plaintiff's Exhibit 2 you say is the claims that were made against you in addition to labor and material?

A. That is right."

The item of $5,000.00 which was borrowed and put in the bank was in addition to the Exhibit 1. The Maryland Casualty Company advanced $10,700.00 under the contract, which has not been paid off and was not included in the list. In addition the corporation owed the Maryland Casualty Company $4,100.00 or $4,200.00 for premiums.

That the items on the second list (Plaintiff's Exhibit 2) contained two items which were claims by defaulting con-

tractors, which the corporation did not owe and should be subtracted from the total of Exhibit 2. That the corporation had unliquidated counter-claim against these disputed accounts; that no suit had been brought on them; that in addition to the $4,100.00 premiums, and the $10,700.00 to the Maryland Casualty, and the $5,000.00 owing to the bank, the corporation owed nothing else, on the New York job.

That there were no judgments in favor of the S & M at the time of the filing of the bill. That there was a claim, but witness did not know whether it was a judgment or not. That the claim for which the Ithaca Trust Company brought suit was $3,000.00 and was not included in Plaintiff's Exhibit 2. That at the time of the filing of the bill, the only other indebtedness of the corporation not arising out of the Batavia Job were claims for labor and materials [fol. 57] on the Fort Lyon's job, but that the current estimates were sufficient to take care of those bills; that the witness was not familiar with the transactions on the Knoxville Job.

Thereupon Plaintiff's Exhibit 2 was received in evidence and is as follows:

"PLAINTIFF'S EXHIBIT 2

Batavia, New York, Job—
Accounts in Dispute

D. Giamberdino—Plaster	$4,124.04
D. Giamberdino—Tile	1,020.05
Dravo Equipment Co.	321.63
Mudy Rupp	2,334.94
Roy Herman	130.50
Martin N. Y. Tent & Duck Co.	538.80
J. G. McJury	54.00
R. L. Carter	404.27
Wm. H. Robinson	141.50
Clyde Sales Co.	20.06
	$9,089.79"

The witness was on the Batavia Job more than his brother and was there continuously until September of 1933, at which time it was finished, except the outside grading. He was there on April the 27th, 1933, when an

agreement marked Plaintiff's Exhibit 3 was signed and when the letter which became a part of it addressed to the Maryland Casualty Company was signed. On the same or the next day a letter to the Veterans' Bureau was signed and mailed.

Thereupon Plaintiff's Exhibit 3 was offered in evidence and is as follows:

"PLAINTIFF'S EXHIBIT 3

Agreement

Whereas the Morley Construction Company of Kansas City, Missouri, is the General Contractor under a contract with the United States Government for the construction of the Veterans' Administration Hospital at Batavia, New York, said contract bearing date of July 23, 1932, and

Whereas the Maryland Casualty Company executed a bond bearing date of August 1, 1932 wherein and whereby said Maryland Casualty Company guaranteed the faithful performance of the above mentioned contract and

[fol. 58] Whereas the Morley Construction Company has encountered financial difficulties in the construction of said Veterans' Administration Hospital and has called upon the Maryland Casualty Company for financial assistance in regard to the completion of said contract in accordance with a letter to the Maryland Casualty Company from the Morley Construction Company bearing date of April 27, copy of which is hereto attached and made a part of this instrument, in consideration of the payment hereinafter referred to and in consideration of the mutual promises of the parties hereto it is mutually agreed as follows:

First. The Morley Construction Company hereby agrees to deposit at the M & T Trust Company in the City of Buffalo, New York the sum of Five Thousand ($5,000.00) Dollars and to deposit from time to time certain other sums of money to be used toward the completion of said contract. The Morley Construction Company further agrees to deposit in said account for the benefit of said contract all moneys and estimates received from the United States Government because of said work.

Second. The Maryland Casualty Company hereby agrees to deposit in said M & T Trust Company to the account

of the Morley Construction Company the sum of Five Thousand ($5,000.00) Dollars.

Third. It is mutually understood and agreed that the said Maryland Casualty Company shall have joint control of all moneys deposited in said account and that no check, draft or withdrawal order shall be drawn on said account and paid by said bank without the approval of the said Maryland Casualty Company by its representatives, James F. Kelly and/or Martin C. Shaus, said approval to be designated on said check, draft or withdrawal order by the initials of the above individuals, to-wit, J. F. K. and/or M. C. S.

Fourth. The Morley Construction Company hereby agrees to pay back to the Maryland Casualty Company the aforementioned sum of Five Thousand ($5,000.00) Dollars out of the proceeds of said job if there be sufficient money and if not, they hereby bind themselves and agree to pay said money themselves to the Maryland Casualty Company.

Fifth. The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient [fol. 59] money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory to the Maryland Casualty Company.

Sixth. The Morley Construction Company hereby agrees to pay to the Maryland Casualty Company any and all moneys advanced to them for payment of plasterers' claims or other laborers' claims on the D. Giamberardino & Sons contract, and any and all moneys advanced by the said Maryland Casualty Company to assist in the completion of the D. Giamberardino & Sons Contract.

Seventh. The Morley Construction Company hereby agrees to give a note in the sum of Five Thousand ($5,000.00) Dollars bearing even date of this instrument to the Maryland Casualty Company as security to them for the payment of the sum of Five Thousand ($5,000.00) Dollars

mentioned in Paragraphs Second and Fourth of this instrument. Dated: April 28, 1933.

Morley Construction Company, by H. F. Morley, Pres. Maryland Casualty Company, by James F. Kelly.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

On this 28 day of April, 1933, before me personally appeared H. F. Morley, to me known, who, being by me duly sworn, did depose and say that he is the President of the Morley Construction Company, the company described in and which executed the foregoing instrument; that he has the authority to sign such instruments and that he affixed his signature thereto by such authority.

William H. Robinson, Notary Public in and for the County of Erie, N. Y.

April 27th, 1933.

Maryland Casualty Company, Baltimore, Maryland.

GENTLEMEN:

As you have been heretofore informed, the work on the Veterans' Administration Hospital at Batavia, New York, has been stopped by reason of labor difficulties encountered by Sub-Contractor, D. Giamberardino & Sons.

[fol. 60] It is claimed by the laborers that they have not been paid since March 9, 1933. These unpaid claims amount to about $7,500.00. In addition to this there are some disputed bills, the laborers claiming that they have not received the full prevailing wage although they have signed receipts for the full amounts. These claims aggregate approximately $5,000.00. This is as the situation now appears.

The work on the plastering contract is at a standstill and this letter is to inform you that the Morley Construction Company, because of the situation on the plastering contract over which they had no control and because of their general financial situation cannot proceed with the work without some financial assistance. We propose that the Maryland Casualty Company advance to us sufficient money to meet the unpaid plasterers' and laborers' bills as stated above—that is, $7,500.00—and in addition to that sufficient money to meet the disputed bills that we have

receipts for if this is necessary to get the men back to work. We estimate that the cost to complete the plastering contract will be approximately $19,550.00. This figure does not include the unpaid plasterers' and laborers' claims as stated above. There is still owing on this contract the sum of $13,500.00, leaving a balance of $6,050.00 to complete the plastering contract on which figures we need financial assistance.

We agree to give the Maryland Casualty Company a demand note payable one year from date for the moneys advanced and, as an additional security, to assign any right which we may have against the National Surety Company, the bonder of D. Giamberardino & Sons plaster contractor, up to the amount of the indebtedness and will render every assistance necessary to prosecute suit against the National Surety Company or any other corporation or individual against which we have a right of action.

In the event that the financial assistance as stated above is given to us we have the assurance that our bank will advance us sufficient money to complete the job according to our contract and pay all outstanding indebtedness on this job.

We wish to urge upon you at this time the necessity of prompt action in this matter. The labor condition is a serious one and the Government is demanding immediate action. The facts contained in this communication are substantially true and are set out for the purpose of inducing the Maryland Casualty Company to advance moneys and credits to us as stated above.

Very truly yours, —— ——.

Copy."

[fol. 61] Thereafter plaintiff offered Exhibit 4, which was duly marked for identification and received in evidence and is as follows:

"PLAINTIFF'S EXHIBIT 4

(Copy)

April 28, 1933.

United States Veterans' Administration, Construction Division, Arlington Building, Washington, D. C.

GENTLEMEN:

In the payment of future estimate checks to the Morley Construction Company on the U. S. Veterans' Hospital at

Batavia, New York, it is hereby requested that you forward checks to the Morley Construction Company c/o Manufacturers and Traders Trust Company, Buffalo, New York, Attention Edward W. Miller, Vice President.

Will you kindly acknowledge receipt of this communication and advise if this arrangement will be satisfactory to you?

Very truly yours, Morley Construction Company,
by —— ——.

BDM:HS."

Thereupon the witness identified Plaintiff's Exhibit 5 as a bond and the Exhibit was offered and received in evidence, and is as follows:

PLAINTIFF'S EXHIBIT 5—EFM

Standard Form No. 25

Approved by the President Nov. 19, 1926

Standard Government Form of Performance Bond

(Construction or Supply)

Know All Men By These Presents, That we, Morley Construction Company, a Corporation with offices in Kansas City, Missouri (See Instructions 4, 5 and 7) as Principal and Maryland Casualty Company, a Corporation of the State of Maryland, as Surety, (See Instructions 2, 3, 4 and 7) are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal [fol. 62] sum of Two Hundred and Seventy-five Thousand and no/100 dollars lawful money of the United States, for the payment of which sum well and *and* truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated July 23rd, 1932, for construction and finishing complete, at Veterans' Administration

Hospital, Batavia, New York, Main Building No. 1, Dining Hall and Attendants' Quarters Building No. 2, Recreation Building No. 4, Nurses' Quarters Building No. 5, M. O. C. Residence Building No. 6, two Officers' Duplex Quarters Buildings Nos. 7 and 8, Laundry Building No. 9, Storehouse Building No. 10, Boiler House Building No. 11, including Radial Brick Chimney and Pipe Tunnel Transformer and Animal House Building No. 12, Garage Building No. 13, Flagpole No. 14, incinerator Building No. 15, Sewage Pump House No. 17, Connecting Corridors Nos. 1-2 and 1-4.

Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this First day of August, 1932, the name and corporate seal

of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[fol. 63] In presence of—

.... (Seal.)
(Individual principal)

....
(Address) (Business Address)

.... (Seal.)
(Individual principal)

....
(Address) (Business Address)

.... (Seal.)
(Individual surety)

....
(Address) (Business Address)

.... (Seal.)
(Individual surety)

....
(Address) (Business Address)

Attest:

Morley Costruction Company,
(Corporate principal),
1643 Belleview, Kansas City,
Mo.
(Business Address.)

..... By H. F. Morley,
President
(Affix corporate seal.)

Attest:

Maryland Casualty Company,
(Corporate surety)
Baltimore, Maryland,
(Business Address.)

..... By A. J. D. Peterson,
Attorney-in-Fact.
(Affix corporate seal.)

The rate of premium on this bond is $15.00 per thousand.
Total amount of premium charged, $8,104.50.
(The above must be filled in by corporate surety.)

(2) 10—1773

Standard Form No. 25—Sheet 2

(Performance Bond)

Certificate as to Corporate Principal

I, C. B. Merrell, certify that I am the secretary of the corporation named as principal in the within bond; that H. F. [fol. 64] Morley, who signed the said bond on behalf of the principal was then President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body. C. B. Merrell, Sec'y. (Corporate Seal.)

Affidavit by Individual Surety

State of ——,

County of ——, ss:

I, —— ——, being duly sworn, depose and say that I am one of the sureties to the foregoing bond; that I am a citizen of the United States, and of full age and legally competent; that I reside at —— and that I am worth in real estate and personal property the sum of — dollars, over and above (1) all my debts and liabilities, owing and incurred, (2) any property exempt from execution, (3) and aggregate full penalties on all other bonds on which I am surety, and (4) any pecuniary interest I have in the business of the principal on said bond; that I own, unincumbered, real estate, the fee of which is in my name, worth — dollars, located in ——; that said property is not exempt from seizure and sale under any homestead law, community, or marriage law, or upon any attachment, execution, or judicial process, and that I am not surety on any other bonds, except as follows:

.....

(State character and amount of each bond. If not on other bonds, so state)

.....

(Surety's signature.)

Subscribed and sworn to before me this — day of ——, 19—, at ——. .....

.....

(Title of official administering oath.)

(Official Seal.)

[fol. 65] (3) 10—1774

Affidavit by Individual Surety

State of ——,
County of ——, ss:

I, —— ——, being duly sworn, depose and say that I am one of the sureties to the foregoing bond; that I am a citizen of the United States, and of full age and legally competent; that I reside at —— and that I am worth in real estate and personal property the sum of — dollars, over and above (1) all my debts and liabilities, owing and incurred (2) any property exempt from execution, (3) the aggregate full penalties on all other bonds on which I am surety, and (4) any pecuniary interest I have in the business of the principal on said bond; that I own, unincumbered, real estate, the fee of which is in my name, worth — dollars, located in ——; that said property is not exempt from seizure and sale under any homestead law, community, or marriage law, or upon any attachment, execution, or judicial process; and that I am not surety on any other bonds, except as follows:

.....

(State character and amount of each bond. If not on other bonds, so state)

.....

(Surety's signature)

Subscribed and sworn to before me this — day of ——, 19—, at ——.

.....

.....

(Title of official administering oath)

(Official Seal.)

Certificate of Sufficiency

I, —— ——, do hereby certify that —— ——, one of the sureties named above, is personally known to me, and that, to the best of my knowledge and belief, the facts stated by such surety in the foregoing affidavit are true.

.....

.....

(Address)

[fol. 66] Certificate of Sufficiency

I, —— ——, do hereby certify that —— ——, one of the sureties named above, is personally known to me, and that, to the best of my knowledge and belief, the facts stated by such surety in the foregoing affidavit are true.

.....

.....

(Address)

(4) 10—1773

Standard Form No. 25—Sheet 3

(Performance Bond)

Instructions

1. This form shall be used for construction work or the furnishing of supplies, whenever a bond is required.

2. The surety on the bond for any bid or for the performance of the contract may be any corporation authorized by the Secretary of the Treasury to act as surety, or two responsible individual sureties. Individual sureties shall justify in sums aggregating not less than double the penalty of the bond.

3. A firm, as such, will not be accepted as a surety, nor a partner for copartners or for a firm of which he is a member. Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stock holdings therein. Sureties, if individuals, shall be citizens of the United States, except that sureties on bonds executed in any foreign country, the Canal Zone, the Philippine Islands, Porto Rico, Hawaii, Alaska, or any possession of the United States, for the performance of contracts, entered into in these places, need not be citizens of the United States, but if not citizens of the United States shall be domiciled in the place where the contract is to be performed.

4. The name, including full Christian name, and residence of each individual party to the bond shall be inserted in the body thereof, and each such party shall sign the bond with his usual signature on the line opposite the scroll seal,

and if signed in Maine, Massachusetts, or New Hampshire, an adhesive seal shall be affixed opposite the signature.

5. If the principals are partners, their individual names shall appear in the body of the bond, with the recital that they are partners composing a firm, naming it, and all the members of the firm shall execute the bond as individuals.

[fol. 67] 6. The signature of a witness shall appear in the appropriate place, attesting the signature of each individual party to the bond.

7. If the principal or surety is a corporation, the name of the State in which incorporated shall be inserted in the appropriate place in the body of the bond, and said instrument shall be executed and attested under the corporate seal as indicated in the form. If the corporation has no corporate seal the fact shall be stated, in which case a scroll or adhesive seal shall appear following the corporate name.

8. The official character and authority of the person or persons executing the bond for the principal, if a corporation, shall be certified by the secretary or assistant secretary, according to the form attached thereto. In lieu of such certificate there may be attached to the bond copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

9. Each individual surety shall justify, under oath, according to the form appearing on the bond, before a United States commissioner, a clerk of a United States court, a notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal it shall be affixed, otherwise the proper certificate as to his official character shall be furnished. Where citizenship is not required, as provided in paragraph 3 of these Instructions, the affidavit may be amended accordingly.

10. The certificate of sufficiency shall be signed by a judge or clerk of a court of record, a United States district attorney or commissioner, or the president or cashier of a bank or trust company.

11. The date of the bond must not be prior to the date of the instrument for which it is given.

(5) 10—1744

There were two men in active charge of the work; Mr. Frizzell in charge of the office and Mr. Rieman. Mr. Frizzell had charge of keeping the accounts. The only contracts that the Morley Construction Company had during its existence were the Batavia Job and the Fort Lyon Job.

Cross-examination:

Upon cross examination the witness testified that the figures which he had incorporated in the two exhibits were compiled from records that were kept on the job. Plaintiff's Exhibit 1 represents the money due sub-contractors and material men for labor and material at this date; that [fol. 68] several of the items claimed by labor and material men were disputed and that the amount of $90,771.34 represented the amount actually due them under their contracts and not the amount claimed. That the Morley Construction Company had some claims against sub-contractors for failure to carry out their contracts. The item on Plaintiff's Exhibit 2 in the amount of $9,089.79 and headed "Accounts in Dispute."

"Q. Does that mean then that this $90,000.00 according to your contention is reduced by that amount?

A. No, reduced by the amount that it shows on there."

Defendant's Exhibit 1 was marked for identification by the reporter; the witness stated that it was a record of the outstanding bills on the Batavia operation only, together with a list of the assets as of the present date. It does not cover the assignment to the Ithica Trust Company and it does not show the amount owing to the Maryland Casualty Company and what was owed to Mr. B. D. Morley; that the claim against the New Amsterdam Casualty Company in the amount of $19,919.11 and another small claim in the amount of $532.83, and a claim against the Standard Accident Company in the amount of $521.00 were all against the not defunct, but which have refused to pay the claims. The claims against the National Surety Company in the amount of $20,689.29 arose out of the default of the plastering contractor whose name was Giamberdino, on whose default necessitated the conference of April 28, 1933.

Under the heading of "Claims Against Government", the item Caulking Steel Company in the amount of $1,130 was a valid claim.

The item of the left-hand side of the Exhibit in the amount of $82,771.00 represented the $90,000.00 less the $8,000.00 claimed against the Concrete Engineering Company and the Phillips Manufacturing Company for penalties for failure to perform within the time stipulated.

The item of $41,661.23 represented the total claim against the bonding companies and the $1,130 represented the total claim against the government, and the Exhibit 1 showed the total claims to be $42,791.23. "Final Check" $59,760 and some cents, and the money in the M & T Trust Company $3,818.61 and the total figure of corporation assets according to the Exhibit was $106,369.84, from which had been deducted $82,771, leaving a balance of $23,598.84 as the total assets claimed, aside from these other claims I have mentioned. These figures were compiled from the records kept on the job.

The witness produced a document marked by the reporter for identification as Defendant's Exhibit 2, which he stated was a complete record of the figures kept on the [fol. 69] job. The item thereon styled, "Batavia, New York, Job, Accounts Settled Since Job Completed" in the amount of $5,781.76 did not diminish the total indebtedness:

At the time the suit was filed, the construction company and the Maryland Casualty Company had on deposit in the Bank at Buffalo $7,900, approximately. The witness stated that the company had approximately $60,000 represented by final payment vouchers plus the $7,900 on deposit in the Buffalo Bank, plus the claim against surety companies; That, therefore, the total amount of liabilities were $82,771 and the total amount of assets were $106,369.84, which, however, included only bills for labor and material, and that the figure of $106,369.84 represented the total assets of the Morley Construction in connection with the Batavia Job, in New York; there are no other assets but there are other liabilities which have already been brought out.

"The Court: Does it include other assets?

A. No, sir.

The Court: Were there other assets?

A. They had no bearing on this job.

The Court: I am not asking you that. Did you have any other assets?

A. Well, there was estimates from time to time that came in from the Fort Lyon contract."

There were no assets in connection with the Fort Lyon Job over and above the liabilities. In addition to the liability of $82,771, there was the money put into the job by the Maryland Casualty Company, there was a compensation bill of the Maryland Casualty Company, a claim of $3,000 and the $5,000 advanced by B. D. Morley. The total liabilities at the time of the filing of the bill were $19,800 plus the $82,771 aforementioned.

"Now, you may tell his Honor whether or not those liabilities were liabilities covered by this bond on the Maryland Casualty Company?

Mr. Harris: Just a minute. I object to that, if the Court please, as calling for a legal conclusion of the witness.

The Court: Sustained."

On April 27th or 28th when the agreement was made, Mr. Cushwa from the home office of the Maryland and Mr. James Kelly from the Buffalo office were present. On the same day another agreement was executed on behalf of the Maryland by Kelly and on behalf of the Morley Company by H. F. Morley, this document was then marked Defendants' Exhibit 3 EFM.

By Mr. O'Donnell:

"Q. I hand you an exhibit which has been marked Defendants' Exhibit 3, and ask you to state whether or not that is a copy?

[fol. 70] Mr. O'Donnell: I understood you to admit that was a copy of the document you sent the next day, Mr. Harris?

Mr. Harris: Yes, that was signed, as I understand, and delivered to the bank at the time the account was opened. Here is the original with both signatures on it, Mr. O'Donnell.

The Court: What is that?

Mr. O'Donnell: It is the contract executed by the Morley Construction Company and the Maryland Casualty Company on April 29, 1933. We will offer it in evidence at this time we also offer Defendants' Exhibits 1 and 2.

Mr. Harris: Just a minute. We desire to object to Defendants' Exhibit 1.

The Court: Sustained.

Mr. O'Donnell: We except."

[fols. 71 & 72]

"DEFENDANTS' EXHIBIT 1"

"Bills Owed	Penalties		Claims Against Bonding Co's.		Claims Against Government	
$90,771.00	Concrete Engr. Co.	$4,000.00	Giamberdino Plast. Co. National Surety Co.	$20,000.29	Caulking Steel Wds.	$1,130.00
	McPhillips Mfg. Co.	4,000.00	Moody L. Rupp, New Amsterdam Cas. Co.	19,919.11		
			August Ohmer, New Amsterdam Cas. Co.	532.83		
			Bryce Plg & Htg. Co. Standard Accident	521.00		
$90,771.00		$8,000.00		$41,661.23		$1,130.00
8,000.00				1,130.00		
$82,771.00				$42,791.23		
			Final Check	59,760.00		
			Money in M & T Trust Co.	3,818.61		
				$106,369.84		
				82,771.00		
				$23,598.84		

Final statement of bills and claims on the Batavia, New York, job.
Dated September 17, 1934.

Morley Construction Co."

[fol. 73] Defendants' Exhibit 2 is as follows:

"DEFENDANTS' EXHIBIT 2

Batavia, New York Job Account Settled

(In pencil) since job completed	
Niedreighaus, Inc.	$1,142.35
Chamberlain Metal Weatherstrip Co.	513.00
C. H. Patek	485.23
Carl Bojohr	155.00
Rochester Cast Stone Co.	181.75
H. C. Little	59.98
Western N. W. Parlock Appliers Co.	108.58
Fairbanks Morse Co.	175.53
Lehigh Portland Cement Co.	2,262.40
Tontine Shade Co.	303.50
Truscon Laboratories	23.63
Western Union	37.75
N. Y. Telephone Co.	42.94
Sinclair Refining Co.	14.94
Enterprise Foundry Co.	13.00
Robt. McBride Boiler Works	194.23
Tuttle & Bailey	31.31
Truscon Steel Co.	31.97
Buffalo Steel Co.	2.87
Climax Corp.	1.80
	$5,781.76"

Defendants' Exhibit 3 is as follows:

"DEFENDANTS' EXHIBIT 3

Agreement

Whereas the Morley Construction Company of Kansas City, Mo., has heretofore entered into an agreement bearing date of April 28, 1933 with the Maryland Casualty Company wherein it was agreed that the Maryland Casualty Company would deposit certain moneys in the Manufacturers & Traders Trust Company in the City of Buffalo, New York to the credit of the Morley Construction Com-

pany and wherein it was agreed that the Morley Construction Company also would deposit certain moneys in said account and

Whereas pursuant to said agreement the said Maryland Casualty Company did deposit in said account the sum of Five Thousand ($5,000.00) Dollars and the Morley Construction Company deposited a like sum of Five Thousand ($5,000.00) Dollars.

[fol. 74] Now, in consideration of such payment and mutual deposits and in the further consideration of One ($1.00) Dollar it is mutually agreed as follows:

First. That all moneys deposited or to be deposited in said account shall be the joint property of the Morley Construction Company and the Maryland Casualty Company and the account shall be in all respects a joint account.

Second. It is further agreed that the original of this agreement be delivered to the said manufacturers & Traders Trust Company of Buffalo, New York and shall constitute to them a notice of the fact that the aforementioned account is a joint one and the property of the above named parties.

Morley Construction Company, by (Signed) H. F. Morley, President. Maryland Casualty Company, by (Signed) James F. Kelly.

STATE OF NEW YORK,
County of ——,
City of ——, ss:

On this 29th day of April, 1933, before me personally came H. F. Morley, to be known, who, being by me duly sworn, did depose and say that he is the President of the Morley Construction Company, the company described in and which executed the foregoing instrument; that he has the authority to sign such instruments and that he affixed his signature thereto by such authority.

(Signed) Anna M. Biere, Commr. of Deeds."

Whereupon the witness was excused.

The Court stood at recess until 1:30 o'clock of the said Thursday, September 27, 1934.

Cross-examination (continued):

Herbert F. Morley resumed the stand as witness and being further cross examined testified that the letter dated April 27th was dictated either by Mr. Kelly or Mr. Cushwa; that there had been conversation with those gentlemen telling them about the difficulties of the construction work and the letter was written thereafter. The witness was unable to recall whether the letter and the contract were signed on the same day or not, but thought that they had been. Plaintiff's Exhibit 3 was dictated either by Mr. [fol. 75] Kelly or Mr. Cushwa. Nothing was stated during the negotiations about depositing the final payment check in the joint account. The witness had a conversation with Mr. Frank Miller about the time of the filing of this suit in which Miller demanded that the final check be either turned over to him or deposited in the joint account. Miller said the agreement provided that this be done, but that the witness stated that there was no agreement calling for the final check to be deposited in Buffalo.

I told him that we had no agreement that I could see that called for that final check to be deposited up there. I also asked him if he said that they had more than one agreement. I said that I didn't have a copy of it, but that if there was a copy or a contract providing for that, if he would get it and it showed it called for us to do that, we would do it. I later found one of the supplemental agreements that we had had, but we didn't comply with his request. It intended to use the proceeds of the check to pay the labor and material bills on the job. He was in Buffalo and on the job when the estimate checks were being paid by the Government and the last estimate check was received sometime around the 15th or 20th of the month. He returned to Kansas City in September, 1933 and the last estimate check had been received before then. The office of the company was in Kansas City and the company could most conveniently handle the money from Kansas City. The office in Buffalo had been discontinued and payment could not be handled from that office. There were approximately 55 or 65 creditors. The money could not be distributed except by some one familiar with the operations and debts of the company. Neither Mr. Kelly or Mr. Cushwa could do this without the witness' help. On one

occasion the Maryland Casualty Company refused to counter-sign a check drawn on the Buffalo Bank. The construction company had a subcontractor for the plastering named Giamberdino and Sons.

"Q. I see where the petition states that they agreed to pay off plasterers' claims and also sufficient money to complete the plastering contract. Could you tell the Court the sum total of those two items, that is, the expense of this plastering contract, that is, those that had not been paid, and also sufficient to complete the plastering contract? What is the total of that, if you know?

A. Well, they paid $10,700 and some odd dollars. They paid $5,000.00 and they paid $5,740.00 toward the completion of the plastering contract.

Mr. O'Donnell:

Q. And then the Maryland Casualty further agreed to place on deposit in said account to the credit of Morley [fol. 76] Construction Company moneys to pay off plasterers' claims, which have not been paid by Giamberdino, who employed said plasterers, and also sufficient money to complete this plastering contract. Now, can you tell his Honor what the total cost of the plastering contract was?

A. Well, there is a statement there in the papers, something in excess of $17,000 was paid out, including the $5,700 that was paid out which they reimbursed us for.

Q. Well, then, can you tell his Honor how much they fell down on paying this sum, that is, how much more was due from them than they actually paid to defray the expenses of the plaster contract?

A. Approximately $12,000."

The statement referred to was based on the actual cost of completing the plastering contract. All the books that were on the job outside of the records referred to were destroyed by fire, including the Articles of Incorporation of the company. Every record on the job was destroyed, and the loss from this fire was around $5,500 or $5,600. Duplicate accounts, correspondence and bonds and contracts were procured from the other parties. Demand was made on the Maryland by the witness for them to pay the plastering. The new subcontractor was the Hudson Plas-

tering Corporation. The final bill for this plastering was $15,000 of which $7,500 was unpaid. When the witness requested Kelly to give him money to pay the first payment at the end of the first month's work by the Hudson Plastering Company, Kelly advised him to pay it out of the funds of the joint account.

"Q. Well, did he say anything as to whether he would or wouldn't carry out his contract,

A. Not at that time, no sir.

Q. Did he at any other time?

A. Yes, sir.

Q. What was it he said?

A. Well, when the next month's payment came due, the first month's payment amounted to approximately $7,500 and request was made that the money be advanced and he advised that I pay it and take care of it out of the funds of the joint account. The next month's account came due and left a balance of $2,500 on the previous month, together with about $6,000 from the ensuing month, and he suggested that I take care of that out of the funds in the joint account, and there wasn't enough money available for that so in order to keep the plastering contractor on the job and have him finish up, I did finally pay him $2,500 out of the joint account and whether at that time or within a few days after that, when I discussed it with him again, Mr. Kelly made the remark that the Maryland Casualty Com-[fol. 77] pany was not going to put any more money into that account or that job."

The witness made no further demand upon Kelly for payment.

Redirect examination:

On re-direct examination the witness testified that Defendants' Exhibit 3 was a contract left with the bank. The other one, the one consisting of two or three pages, was the contract between the two of us, the Maryland Casualty Company and the Morley Construction Company.

The claim of the Central Clay Pipe Company amounting to something less than $2,000 appearing on Plaintiff's Exhibit 1 was reduced to judgment before November 28, 1938, and he believed an execution had issued on this judg-

ment. The witness testified he did not think that there was a judgment in favor of the Dravo Equipment Company. He had signed a check and left it with Mr. Kelly to pay this account amounting to three hundred and some odd dollars. The statements given in evidence represented the accounts as of the present date. Plaintiff's Exhibit 6 was marked for identification and the witness stated that it was a statement prepared in the office on the job and given to the Maryland. The only item of consequence which had been paid was for $1,500 to the Turner Resilient Floor Company. That at the time of the conversation Cushwa and Kelly the witness testified told those gentlemen that the company was indebted to Bernard for money loaned by him to the Company from time to time. He might have stated that it was as much as $15,000 or $20,000. The witness did not at this meeting state that there was sufficient money coming from the Government to complete the Contract.

"Mr. Harris:

Q. Now, at that time, Mr. Morley, there was practically $13,500 still to become due under the plastering contract, wasn't there.

A. That was the figure that was discussed.

Q. No, I mean under the original contract.

A. On the plastering item?

Q. Yes.

A. I say that was the figure that was discussed at that time, $13,500.

Q. And that would have completed it, if it had been paid, would it not?

A. No, sir.

Q. Wasn't your contract with Mr. Hudson eventually only $14,000?

A. That was for labor only, Mr. Harris, but in that figure of $13,500, after this contract between ourselves and [fol. 78] the Maryland Casualty Company was signed, it was discovered that Mr. Giamberdino had failed to pay the material bill amounting to a little less than $3,000, which would have reduced that by that much."

That plastering contract was completed although there was extra work and extra money owing to Hudson. The

assets included a claim against Giamberdino for some $20,000. Giamberdino also has a claim against the Morley Company, but the claim by the Giamberdino against the Morley Company was not listed by the witness as a liability. We claim $19,000 due from Mr. Rupp, the grading contractor. Mr. Rupp's Estate is also claiming against us and we are claiming against him. We listed our claim against Rupp as an asset but Rupp's claim is not listed as a liability.

We have a claim against the Standard Accident Company for $500 and some dollars for material sold to some of Bryce Plumbing and Heating Company's subcontractors. The Standard Accident Company was surety on Bryce's contract to us, and we are contesting all of these claims and have not as yet brought any suit against any of these persons to establish any of our claims.

Giamberdino was placed in default in April, 1933, but no suit was brought by the construction company although the witness placed it in the hands of attorneys in Buffalo. His conversation with Mr. Miller was either a day or two before or after the suit was filed, and the final check received. He asked Mr. Miller to get a copy of the contract. He recalled Mr. Clif Johnston being at the office of the Morley Company but could not remember on what day. Bernard Morley was in Colorado during that week. He did not remember when Bernard returned, but was in the office the last of that week.

"Q. You don't recall Mr. Johnston being down there on Saturday morning and the girl telling you he was there and you sent word you could not see him, do you recall that?

A. Well, we told that to quite a few that day.

The creditors were pressing the Morley Company during this time.

How did it happen that you had $7,900.00 in the bank that you hadn't paid out if they were pressing you so hard?

A. Well, we proceeded to pay off the smaller accounts out of that fund and it didn't represent enough to take care of any of the larger ones.

Q. Isn't that what happened, Mr. Morley, didn't you tell Mr. Kelly you wanted to let that account ride as it was and wait until you got the whole amount and then try and

[fol. 79] make advantageous compromise settlements when you had the whole amount available?

A. I believe I did.

Mr. Harris:

Q. And was it intended that that whole amount should go through this account and be paid out under this joint control, was it not?

A. No.

Q. At the time it was made?

A. No, I don't think that was the intent.

As I recall it, current estimates was all that was discussed. I don't believe there was ever a word said about a final estimate. At that time we owed quite a bit.

Q. Well, anyway, at the time this letter was written, you owed $129,000.00, or approximately that?

A. Well, those figures were gone into. I don't recall just what the amount was.

Q. You say then the Maryland Casualty Company put up $5,000.00 and $5,000.00 more in the face of that $129,000.00 with the understanding that the final estimate or final money was not to go towards reduction of those bills at all, is that what the understanding was?

A. I make the statement to the best of my knowledge there was nothing discussed about any disposition of the final payment on that job.

Q. You mean it was all treated alike, it was not separated one from the other?

A. I am not saying that. I made the statement that at no time do I recall that there was ever anything said about any final payment.

Q. Was there anything said that it should not?

A. I say that there was nothing discussed about it.

Q. The only question was that the money to be received on that job was to go into this account. Now, that was discussed, wasn't it?

A. The estimates were discussed from the time we started on it.

Q. What did you mean by 'moneys'?

A. I didn't have anything to do with drawing that contract, Mr. Harris.

Q. You had something to do with signing, did you not?

A. I signed it, yes.

Q. What did you have in mind with reference to moneys when you signed that contract?

A. I covered that, I think, in my letter to the company.

Q. The letter preceded the contract.

A. It was made a part of the contract, wasn't it. They accepted it at such.

[fol. 80] Well, what I am getting at is whether they made any distinction at all between final estimate and monthly estimate and retent?

A. There wasn't anything said about it."

We asked for assistance in connection with the plastering contract. He did not ask for assistance in connection with the whole job. To the best of the witness's knowledge there was nothing discussed as to the disposition of the final payment on the job. The witness testified that he received a check about November 15th or 16th and carried it on his person. He did not notify the Maryland or the M & T Trust Company. He stated that he intended to pay it on the payment of labor and material bills.

"Q. And that is what they were doing with the money that was then in the M and T Trust Company, was it not?

A. That was going to be the eventual disposal of it.

Q. Was it your idea you would disburse it without the countersignatures of the Maryland?

A. Which money are you referring to?

Q. This $59,000.00.

A. Well, that was my idea, yes, sir."

It was his idea to disburse it without the countersignature of the Maryland. He did not think that their signature was a part of any agreement. He did not know whether he could have obtained their countersignature or not.

"Q. Well, you got their countersignature on every one you sent back except two, did you not?

Q. Isn't that right?

A. With the exception of the two, yes, sir.

Q. One of those was for attorneys' fees, was it not?

A. I think they both were.

Q. Both were for attorneys' fees?

A. Yes, sir."

The two countersignatures refused by the Maryland were both for attorneys' fees. Mr. Kelly told the witness that

the reason they were not signed was that they were not for labor and material going into the job. I do not recall them ever refusing to sign any checks except these two attorneys' fees checks.

"Q. And didn't we continually write you even after this suit, put ourselves on record that they were willing at all times to countersign them?

Q. Isn't that true?

A. We received correspondence from them, yes, sir."

After he returned to Kansas City he sent a letter to the Government to send the final payment check to the company at Kansas City. He did not send a copy of this letter to the Maryland. The total contract price of the [fol. 81] job was $543,000.00. The retent was 10%. The difference between the retent and the check in the amount of $59,780.00 was for work done after the last estimate. The $5,000 advanced by the Maryland Casualty plus the $13,000 or $13,500 due from the government would have probably been sufficient to complete the plastering contract.

Direct examination:

James F. Kelly called as a witness by plaintiff testified that he was an attorney employed in the office of the Maryland Casualty Company at Buffalo and that from April 26th, 1933 until the completion of the job. He worked on the matter in conjunction with Mr. Morley. That on the 25th of April, 1933 he and Mr. Cushwa went to Batavia and interviewed Mr. Morley in response to a request sent to the home office regarding assistance on the job. Mr. B. D. Morley was not present and the next day a second conference was had in Kelly's office. Mr. Cushwa and an attorney by the name of William Robinson were present.

"Q. You recall the letter of April 27th, which is attached to that contract?

A. Yes, sir.

Q. What had been the discussion prior to that with reference to the financial condition of the Morley Construction Company or their ability to carry forward this contract?

A. On the 25th while we were in Batavia Mr. Morley outlined the situation to us and pointed out to us the facts."

On the 25th Morley had informed us that the plasterers' situation was bad, because of a strike and that they had no money to finance the situation; that they would not be able to raise any money at all in Kansas City to finance it because they didn't know just what the extent of the situation would be; that if the Maryland did not assist them, we would have a hospital on our hands and that after further conversation the letter of the 26th was written. That both the Morleys sat in and suggested various things that should go in the letter. That Mr. Cushwa said the Maryland could not advance money unless it had control over the moneys coming due on completion of the job. The undisputed plaster claims were estimated by Mr. Morley at that time to be $7,400. We later found out they were only $5,700. We were talking in regard to the financing and paying off of those claims when Mr. Cushwa asked for joint control of the moneys coming due. Mr. Bernard Morley said that he couldn't give him the joint control of any of the moneys coming due as that would hurt their financial condition here [fol. 82] in Kansas City. He then said that if Mr. Cushwa would advance an additional $5,000.00, he then would give him, give the Maryland, joint control of all moneys due under the contract. That we agreed to do after Morley said he himself would raise $5,000.00 immediately to open the joint deposit with our account of $5,000.00. That every nickle the government was holding was to go into the joint account. The letter was written in my office, and B. D. Morley, H. F. Morley, William Robinson, my stenographer, Mr. Cushwa and myself were present. The contract (Plaintiff's Exhibit 3) was written probably an hour afterward. The thought expressed in the contract was the thought of all of us. As we would come to a particular portion of it, we would discuss it and decide how to word it. It was discussed that all moneys coming due under the contract were to be deposited in the joint account and no distinction was made between estimates and retents. Directly afterward, the letter to the Government directing it to send the drafts to the M & T Trust Company was prepared by Mr. Morley at the suggestion of Mr. Cushwa. Defendant's Exhibit 3 was drawn because the M & T Trust Company requested something in writing to show the account was a joint account.

"The Court: I would like to see their agreement.

Mr. Harris: Here is Exhibit 2, your Honor, which bears both signatures, the one submitted to the bank."

This contract was delivered to the bank purely to give the bank authority to treat it as a joint account.

The discussion as to the amount of bills payable indicated that figure to be obtained from Mr. Morley. It showed the construction company have bills payable of $126,477. It showed labor and materials complete, $12,200; balance receivable from the government, $153,090. The net result under those figures was $14,393, which with the $13,500 owing on the plastering contract would show a balance of profits of $893. That Morley told us that if we would assist in paying off the plaster claims and put $5,000 in the joint account he would put in another $5,000 and then be in a position to borrow money in the sum of approximately $20,000 in Kansas City to finance all of the other items on the job. There was nothing said about this being necessary to carry the contract forward and that where he didn't have enough to use the estimates, he would borrow the money in Kansas City. That $5,000 put in by Morley at the opening of the account was all they put in. The contract went on to completion and there was disbursements and deposits in the joint account. At the time the suit was brought around $7,000 was in the joint account. Mr. Morley and I had a conversation just before he left town and at [fols. 83 & 84] the time the last estimate, which was around $15,000 was paid. Mr. Morley told me that he desired to keep this estimate intact as much as possible to bunch it with this final estimate of $59,000 so that he could have the particular fund to say to his creditors, "I have $70,000, for example, to pay $100,000 worth of bills." And that he was coming to Kansas City and have some friend act with him to adjust those claims. Nothing was said about the money being diverted or anything else. Plaintiff's Exhibit 6 was a list of contractors and materialmen on the Batavia Job, prepared by Mr. Frizzell for me and is the very sheet given me by Frizzell. Each month I had similar sheets showing the changes.

Whereupon Plaintiff offered in evidence Plaintiff's exhibit 6, which is in words and figures as follows:

(Here follows 1 photo, side folio 85)

Page 6

Lincoln Engineering Co.	31424	1102 79	32526 79	28166	4359 79	
American Tinsa Co.	11350	0	11350	8388	2962	
Cochrane Steel Const. Co.	13000	264	13264	11	1820	
Vandergrift Steel Co.	12870	364 80	13234 80	9128	4106 80	
[illegible] Mfg. Co.	31500	806 72	32306 72	17791	14514 72	
Ridings Iron Co.	5109	126	5235	4089	1145	Paid 4/21/24 by check [illegible] 4/21/24
Roellin Iron Mfg. Co.	9300	106 20	9406 20	1404	8002 20	
Ideal Iron Metal Manufacturing Co.	1250	63	1313	900	413	
Coal & Iron Co.	150	0	150	27	123	
Bamford Iron Co. (Cleveland)	24464	648	25112	18886	6226	
Anderson Iron Co. (Lisle)	4900	0	4900	3418	1482	
Chicago Elevator Co.	125	0	125	125	0	
Olson Foundry Co.	3000	58	3058	1743	1315	
Johnson Corp. Steel Works Co.	23750	130 50	23880 50	17379	6501 50	
Iron Machine Works Co.	1311	0	1311	811	500	1500.00
[illegible] Co.	12300	94 31	12794 31	12664	130 31	Paid 4/21/13 by check dated 4/13/24 consigned 4/21/24
Steel Engineering Co.	1750	0	1750	1517	233	
Forge Co.	202 50	0	202 50	0	202 50	
American Bridge Supply Co.	1568 75	0	1568 75	0	1568 75	
Steel Works Co.	155	0	155	0	155	50.00
Steel Structural Co.	3150	0	3150	1235	2564	
[illegible] Co.	2454	154	2454	2454	0	
Iron & Steel Co.	474	0	474	153	321	
Metropolitan Safe Co.	85	0	85	85	0	
[illegible] Co.	13215	260	13545	11210	2336	
Structural Steel Co.	418	22 50	997 50	815	181 50	109.05
Engineering Co.	4150	0	4150	3416	733	
Western Steel & Tube Co.	14500	0	14500	12586	1913	
Lehigh Structural						
H. C. Little	5300	0	5300	5240	59 76	
Standard Iron Co.	5016	79	5095	3912	1183	
Hamilton Steel Co.	17700	447 78	18147 78	11666	6481 78	
[illegible] Co.	7014	337 50	7422 50	9265	1815	
Western N.Y. Structural Supplies	675	0	675	566	109	69.00
Structural Steel & Window Glass Co.	2660	152 78	2812 78	1943	868 78	
Imperial Chemical	1800	95	1895	2416		
Fairbanks Morse Co.	188	0	188	6	176	10.88
Keystone Planing & Lumber Co.	1178	50 25	1228 25	936	291	
Ray Herman	2400	0	2400	2220	180	
[illegible] Co.	7800	360	8160	7800	360	
Standard Iron & Steel Co.	625	0	625	0	625	

Western N.Y. Pa. R.R. Operators	675	0	675 00	566 00	108 00	69.00	
Wilds Blake & Bunbow Glass Co.	2682	152 79	2303 72	1905 73	548 73		
Augustus Holmes	1800	95	1895 00	2416 53			
Jabez Burke Mason Co.	188 46	0	188 46	6 72	176 46	10 00	
Neil L. Downing & Jackson Lumber Co.	1175	58 26	1221 26	936 29	291 43		
Roy Hammond	3400	0	3400 00	2264 95	1800		
[illegible] Co.	[illegible]	361	2161 00	[illegible]	1260 29		
Howard Iron & Steel Co.	625	0	625 00	0	625 00		
William Hamin	300	0	300 00	250 00	50 00		
Graham Brady & Cassan	475	0	475 00	475 00	0		
Gale Coal Co.	4000	28	4028 00	3128 00	900 00		
Universal Metal Sash Co.					875 25		
Keller Alloy Mfg. Co.					769 51		
Lehigh Portland Cement Co.					2377 00		
[illegible] Shade Shop	482 50	44 28	476 78	180 00	326 78	152 00	
[illegible]					2843	14 A	
John Schutt Jr.					172 29		
Owasco Lumber Coal Co.					362 29		
Fred Delany					374 29		
Avery Cooling Corp.					135 75		
[illegible]					1316 00		
Kendall Alloy Bucket Co.					1442 29		
Western N.Y. Tool & Die Co.					585 00		
Electrical Union					247 75		
[illegible]					64 00		
N.Y. Allegheny					14 05		
Victoria Lumber & Coal Co.					253 95		
Chas. Y. Cameron					77 85		
Keystone Refining Co.					141 29		
[illegible]					70 29		
Hallenbeck Trading Co.					30 00		
Enterprise Foundry Co.					18 00	7 00	
Rapp & Lockport Construction Co.					14 00		
Robert M. Gordon					192 29	14 30	
Walter Wright					[illegible]		
[illegible]					404 27		
Goodell & Gurney					41 00	Paid by check by mail, money [illegible] by [illegible]	
Hart & Hart Co.					144 00		
John A. Lesh & Son					28 09		
[illegible]					31 95		
Eagle Valve Co.					20 29		
Pittsburgh Steel Co.					27 00	2 07	
Niagara Lumber Co.					15 00		
Solomon & Co.					120 00	120	
					7661 09		
[illegible] (Plastic)					2794 00		
[illegible]	1390 00	121 98	1512 97	755 00	1678 97		
	[illegible]	[illegible]	[illegible]	[illegible]			
					10766 13	1072 [illegible]	

[fols. 86 & 87] Considering the Hudson Plastering it shows $107,066.23.

"Q. All of that, as I understand, is for labor and material bills?

A. Yes, with the exception of the way they set this thing up. D. Giamberdino & Sons had two payments due them, one for $4,124.04 and another of $965.38. Now, that should not appear as Giamberdino defaulted and the balance of his work was done by Hudson and it shows the amount due Hudson, so both of those should not be charged, but merely the Hudson one."

That there should be deducted about $5,000. The list did not include the $10,700 advanced by the Maryland Casualty Company. He countersigned all of the checks with the exception of one or two. The only checks not countersigned either by me or Mr. Schaus were two for attorneys' fees. He had never told the Morleys he would not sign any. This was generally handled by Mr. Morley leaving some already signed in my office and if the bill was a proper one I would countersign the check and mail it either to him or the creditor, other times, he would make out the check and mail it to me and I would mail it to the creditor. The plan of operation is practically the same since Morley came back to Kansas City.

Cross-examination:

Upon cross examination the witness testified that the contract dated the 28th designated the account as the account of the Morley Construction Company and on the next day the contract was changed to provide that the moneys deposited in the account should be the joint property of the construction company and the casualty company.

"Q. Now, in this first paragraph of this Exhibit 3, that is, the first contract dated April 28th, I find you use the language, 'The Morley Construction further agrees to deposit in said account for the benefit of said contract all moneys and estimates received from the United States Government because of said work.' You saw that word 'received' in the past tense, didn't you? Did you mean that they were depositing what they had already received or—

A. (Interrupting): All moneys they were going to get their hands on. At that time they had none.

Q. You used this word, however, in the past tense. You didn't put in 'whatever they will receive in the future'?

A. You have it there. I don't know."

The witness understood that the letter attached to the contract of April 27th was incorporated as a part of the contract to explain the situation. The letter of the 27th contained the statement "we estimate that the cost to com- [fol. 88] plete the plastering contract will be approximately $19,550," was known to the witness, and he knew that this phrase appeared therein, but he did not know how much more it cost than that figure. All the company paid was $10,700.

"Q. Well, excuse me. I think I will probably help you out. The second paragraph of this contract dated April 28th is very short and contains the following statement: 'The Maryland Casualty Company hereby agrees to deposit in said M & T Trust Company to the account of the Morley Construction Company the sum of Five Thousand ($5,000) Dollars,' and in the fifth paragraph you say: 'The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract.'

A. Yes.

Q. So that all you did put in for the purpose of completing it was $5,700?

A. The situation——

Q. (Interrupting.) Answer the question, please.

Mr. Harris: You don't read the whole sentence. You stopped right in the middle of the sentence.

Mr. O'Donnell: I have gone as far as necessary.

Mr. Harris: If the Court please, I submit that is unfair to the witness to ask him about a sentence and stop right in the middle of a sentence.

Mr. O'Donnell: Well, I will put it in this form, I only want to get the matter straightened out."

The witness testified that in addition to the $10,700 the Maryland agreed to take care of the disputed plastering claims if the Veterans' Administration ruled that it was

necessary to pay them. They were never paid because it was ruled that the Veterans' would stand on the receipts as given by the employees. The letter to the Veterans' Administration, Plaintiff's Exhibit 4, the witness thought had been dictated by B. D. Morley, and Mr. Cushwa. At the time, Herbert Morley and the witness discussed the payment of the plasterers' bills. There was an estimate coming due on the job and the witness said to Mr. Morley, "Are you going to pay that part on the plaster contract out of the estimate, just as we understood," and Morley did so. That Morley did ask him to pay the Hudson claims and he told him to pay it out of the estimate coming due. Mr. Schaus is the Claim Manager of the Maryland Casualty in Buffalo.

Thereupon the witness was excused.

[fol. 89] HAL R. LEBRECHT called as a witness on behalf of the plaintiff testified that he was President of the Merchants Bank and was in November, 1933. The government warrant was used to purchase a cashier's check which was written up but not signed and remained in the drawer of his desk. The warrant was United States Treasury Warrant, Veterans' Administration No. 2,213,115. It appeared on the cashier's check register of the bank. The cashier's check was No. 19,519. The cashier's check had been in possession of the bank ever since, and was cancelled out because the Veterans' check was not paid. The money on the treasurer's check was never received by the bank. It was deposited in the Federal Reserve Bank on the same date which was November 22nd; Morley Construction Company had a small account which had existed prior to the formation of the Morley Construction Company.

Cross-examination:

Upon cross examination by Mr. O'Donnell the witness testified that the cashier's check was cancelled on January 4, 1934. The original voucher was returned to the Secretary of Treasury and was not returned to the bank. The Morley Corporation never had an account at the bank. He knew that the Morley Construction Company had a contract at Fort Lyon and Los Angeles.

By Mr. O'Donnell:

"Q. Do you know about when it was finished?
A. Was that the one they received a big check and paid all the bills at once.
Q. What was the check they received?
A. About $60,000."

The witness states that this check was brought down and deposited in the Merchants Bank and he issued Cashier's checks for the Morleys, and bills were paid in this manner. The Morley brothers had deposited $100,000 in the Merchants Bank since last November.

"Q. Did you ever do anything about those gentlemen running away with any money of any kind?
Mr. Harris: I object to that, if the Court please.
The Court: Sustained."

The witness stated that he had been the Morleys' banker for more than ten years. That he knew they had a contract at Fort Sill, Oklahoma.

"Q. And you may state whether or not there were any claims——

Mr. Harris (interrupting): If the Court please, I object to that."
"The Court: Sustained.
Mr. O'Donnell: We except."

[fol. 90] The witness testified that he talked to Herbert about what was to be done with the amount of the cashier's check.

"Q. What was the conversation you had with him at the time he deposited it?
Mr. Harris: We object to that as hearsay.
The Court: Sustained.

Mr. O'Donnell:

Q. Well, you may state on whose suggestion this was done, yours or his.

Mr. Harris: I object to that.
The Court: Objection sustained.
Mr. O'Donnell: Exception."

In April of 1933, he knew they had trouble with the plastering contractor and had a claim against the New Amsterdam.

"Mr. Harris: I object to that as not responsive to the question.

The Court: Sustained."

That he was preparing to lend the Morleys $10,000.

"Q. Why didn't you loan it to them?

Mr. Harris: I object to that as entirely immaterial to any issue in this case.

The Court: Sustained.

Mr. O'Donnell: We offer to prove by this witness that it was understood that if the Maryland Casualty Company had complied with this contract and put up what they had agreed and paid the plasterers' claims that this gentleman would have advanced them $10,000.

Mr. Harris: I object to the offer.

The Court: Sustained.

Mr. O'Donnell: Exception."

Thereupon the witness was excused.

GEORGE F. CUSHWA was produced as a witness on behalf of the plaintiff and testified that he was an associate manager of the Maryland Casualty Company and in the surety claims department since 1912 or 1913. His first contract with the Batavia Job was a notice to go to Buffalo, from the home office. He got in touch with Mr. Kelly and they went to Batavia—that was April 25th or 26th, 1933. The work had practically stopped when he got there. That he asked Mr. Morley how much he owed, what it would cost to complete the job and to make up an estimate.

"Mr. Harris:

Q. Did he give you that?

A. Yes, sir.

Q. Was that the statement Mr. Kelly offered here?

A. Yes."

[fol. 91] The witness testified they asked for assistance and were told by Bernard Morley that unless they got it

the Maryland would have a hospital on its hands to complete. That the Morleys stated they were unable to go ahead on account of their financial condition. He was in and out of the office while Plaintiff's Exhibit 3 was being written.

"Q. Mr. Cushwa, was there any discussion about depositing any moneys conditioned upon your doing any particular thing?

Mr. O'Donnell: If the Court please, we object for the reason that as we see it the contract is definite and they are seeking to vary a written contract. Object to it because it is incompetent.

The Court: Overruled.

Mr. O'Donnell: Exception."

There was a long talk about depositing the money in the joint account and they refused to put up any money unless the Maryland should have joint control of all moneys derived from the contract. It was agreed that the Maryland should put up $5,000 if the Morleys would put up $5,000 to be deposited in the M & T Bank under the joint control of the Maryland and the Morleys' company. It was said that all moneys would be deposited under joint control for the purpose of paying the labor and material bills in completing the contract. He had prepared the letter to the Veterans Bureau, together with Mr. Morley. He saw Herbert Morley in Washington later and Morley said it was his idea to pay all of the money derived from the contract and the moneys coming from the government and he would attempt a compromise with the creditors and save everybody from loss: He discovered through the Maryland's Washington representative that the Veterans' Bureau had mailed the check to Morley at Kansas City; that the Maryland was at all times willing to pay out the amount of the checks on debts incurred on the job. He knew that there was a suit pending in Batavia under the Hurd Act. He had received notification of claims prior to November 23, 1933.

Cross-examination:

Upon cross-examination by Mr. O'Donnell, the witness testified that when he found out the check had been sent to Kansas City he wired the Morleys to turn the check

over to Maryland. On the 25th of November, he instituted a suit in the Supreme Court of the District of Columbia and that that suit is still pending, restraining the Treasurer of the United States from paying the voucher.

[fol. 92] "Q. So that regardless of what happens to this case, it will be impossible for the Morleys to get that check as long as that suit is pending?

A. Oh, no.

Q. And the order is not set aside, isn't that right?

A. I assume that is right, but it could very easily be arranged when this is determined here."

Defendant's Exhibit 4 was then identified, was handed to the witness and the witness testified that the final settlement was made on November 9, 1935.

"Q. Then your liability under your bond, that is, the Maryland's liability under the bond or its liability to sue back in Buffalo didn't accrue until six months after November 9th, that is right, isn't it?

A. I assume that is right.

Q. And then six months after May 2nd will end the time that these people can intervene, as you understand it?

A. In the meantime, we were deluged with bills and judgments."

He did not know what the Maryland had done as to denying liability on its bond in the suit in Buffalo. I did not instruct the Maryland Casualty Company to deny liability on the bond.

By Mr. O'Donnell:

—Well, you may state as manager whether or not you were responsible for or know of any instructions given to the counsel in that case to deny liability on the ground there was collusion between the Morley Construction Company and the Government.

A. I don't know anything about that.

Q. You don't say that such an answer has not been filed?

A. I don't know anything about it.

Q. And that you say you aren't liable on that bond, is that right?

A. I didn't say that."

No bids were made by plastering contractors after Mr. Giamberardino failed to my knowledge. He had nothing

to do with the acceptance or rejection of bids made by plastering contractors after Giamberardino failed. As to payment of bills they relied as to the correctness of such bills on Mr. Morley.

"Mr. O'Donnell:

Q. Now, then, the fact is that you claim that the purpose of putting that in the joint account is so that you can supervise your employees, supervise the payment of this money.

A. Yes. If we get a bill, an itemized statement of the account and it is O. K. and the Morleys O. K. it, we O. K. it. [fol. 93] Q. That is to say, before your employees or anybody representing you can O. K. it, he must exercise his judgment and——

A. (Interrupting.) No.

Q. He has to exercise some discretion?

A. He does, yes. He is supposed to get the bills and payrolls and have them brought up by the Morleys.

Q. As a matter of fact, the Morley Construction Company in undertaking to disburse that money will have to look into it and see whether the claims are valid?

A. Yes.

Q. And if not, advise a contest of the claim and the money can't be disbursed, properly disbursed, unless both the Morleys and the Maryland Casualty Company, or somebody representing it, exercises judgment and discretion?

A. I think that is true.

Q. Isn't that right? And in addition to that, the trust Company can't honor these checks and do it properly, unless they look into it to ascertain whether or not the signatures, rather, the checks are properly executed and properly countersigned?

A. I should—yes, I would think that is a duty of a bank as to what they shall do. I can't tell you what a bank will do.

Q. That is what I mean?

A. You know that as well as I do.

Q. Now, so the record—well, I don't believe we need to put that in the record. As I understand you, then, there is a suit pending in the Federal Court in Buffalo, New York, under the Hurd law against the Maryland Casualty Company and the Morley Construction Company?

A. There is one suit and a number of intervenors, one suit has to be filed and a number of intervenors, but I don't know how many are in it, but a great many of them."

There was never any fixed amount that the Maryland Casualty Company agreed to advance on this contract. I should say $10,000.00 or $11,000.00 was about what we figure it would cost on that statement where Morley said 'this is what is would cost.' I think we put in that we could complete this contract in eight weeks of eight payrolls of $1,000.00 each. That would be eight weeks. As a matter of fact it was more than 30.

He did not suggest to the Morley that they did not need any written contract and that the advancement of the moneys could be taken care of without it. He did not know anything about the Maryland paying the overage on the [fol. 94] plastering contract, and he did not know what the word overage means.

Redirect examination:

On re-direct examination, defendant offered as part of cross examination Defendants' Exhibit 4, which is in words and figures as follows:

"DEFENDANTS' EXHIBIT 4

Veterans Administration, Washington

(Seal.) September 24, 1934.

Your File Reference: In Reply Refer to: HA

Morley Construction Company, 1643 Belleview Avenue, Kansas City, Missouri

GENTLEMEN:

Further reference is made to your letter of August 28 and acknowledgment made to your letter of September 12, 1934 relative to your request for certified copy of final settlement memorandum under your contract for construction work at Veterans' Administration Facility, Batavia,

New York. There is enclosed herewith certified copy of the final settlement memorandum in question.

Very truly yours, (Signed) L. H. Tripp, Director of Construction. P''

Enc.

Clifford H. Weiss produced on behalf of Plaintiff testified that he was in charge of new accounts at the M & T Trust Company in Buffalo; that he recalled the opening of the Morley Construction—Maryland Casualty Company account. That it was opened on April 28, 1933 with $10,000 in the name of the Morley Construction Company joint with the Maryland Casualty Company. That the ledger sheet contained a record to remind the bookkeeper that checks should be countersigned by ''J. F. K.'' or ''M. C. S.'' The account continued in that name until June 21, 1933 when it was changed at the order of Morley and Kelly to joint account in the name of H. F. Morley and the Maryland Casualty Company. The original account was the Morley Construction Company alone with the countersignature. The account was an active one and deposits were $10,000 on April 28th; $5,500 on May 4, 1933; May 10 [fols. 95 & 96] $25,276.50; May 15th, $206.53; June 14th, $31,179; November 22, 1933 there was a balance in the account of $7,997.44 and the present balance is $5,424.17. That no representative from the Morley Construction Company was ever refused statements and cancelled checks of the account.

''(Mr. O'Donnell): We object for the reason that — is not shown that he is the gentleman to whom that would be presented.

The Court: Overruled. That can be brought out on cross examination.''

He stated that he did not know whether any demand had been made for the statements or cancelled checks. There was never any statement refused. I have searched the files to find out whether any demand was ever made and I found no correspondence on it at all.

Cross-examination:

On cross examination by Mr. O'Donnell thewi tness testified that the bank had about 500 employees. His title was

Chief Clerk. He did not know Morley's Superintendent, Mr. Frizzell. He was not the person in the bank to whom a customer would come to ask for cancelled checks. There was no difference in the mechanics of withdrawing money as to the first and second accounts. That a check on the money now in the bank upon being presented if in proper form would be paid and that the collection officer to whom it was presented would exercise his judgment as to whether the signatures were proper.

Plaintiff's Exhibits 9 and 10 were then offered and received in evidence and are as follows:

(Here follows 2 photos, side folios 97 and 98)

100A

97

THIS IS TO CERTIFY that [illegible] MORLEY CONSTRUCTION [illegible] adopted at a meeting of the Board of Directors of (Insert correct corporate name)

a corporation organized under the laws of [illegible] Inc. possessed and held in accordance with law and the by-laws of said corporation at the office of [illegible] Kansas City Mo. on the [illegible] day of [illegible] 19[illegible] and that such resolutions are now in full force and effect:

RESOLVED, that MANUFACTURERS AND TRADERS TRUST COMPANY, of Buffalo, N. Y., be, and hereby is designated as a depository in which the funds of this corporation may be deposited by the officers, agents and employees of [illegible]

FURTHER RESOLVED, that [illegible] be, and [illegible] hereby authorized to deposit [illegible] and to endorse [illegible] for collection, and [illegible] H.F. MORLEY - PRES. & SIGNED BY AN OFFICER OF MARYLAND CASUALTY CO.

and [illegible] of them are hereby authorized to sign checks and orders for the payment of money withdrawing funds so deposited, and that the said trust company shall be and hereby is authorized and directed to honor and pay checks, drafts, bills of exchange, acceptances, promissory notes and other orders and promises so signed, drawn, accepted or endorsed as aforesaid (including checks drawn by each or either of the authorized names of the officer signing the same) without inquiry of any kind, and shall not be responsible for the proper application of the proceeds of any such checks, notes, drafts or other instruments for the payment of money, whether payable to or tendered for deposit to the credit of or in payment of the obligations of any officer or employee of this corporation, or otherwise.

FURTHER RESOLVED, that such checks or orders may have, in lieu of the corporate title or title of the officer or officers so signing, the legend "Authorized Signature", and that specimens of the signatures of the officers above named, together with a specimen of the legend "Authorized Signature" shall be placed on file with said trust company.

FURTHER RESOLVED, that in case this corporation may request the trust company to also transact on any item or items, any officer of the corporation may execute and deliver such agreement in regard thereto as shall be required by said trust company.

FURTHER RESOLVED, that the [illegible] be, and [illegible] hereby authorized and empowered to borrow money, discount or sell, assign and deliver any of its bills, notes or accounts receivable from time to time, for and on behalf of and in the name of this corporation, and to sign, endorse, execute and deliver notes and other obligations of this corporation or any collateral held by this corporation, in such amounts, for such length of time, at such rate of interest and on such terms and conditions as the or they shall deem proper, and to pledge any bonds, stocks, bills, notes or accounts receivable, bills of lading, warehouse receipts and/or any other securities or property of this corporation as collateral security therefor, and to make such endorsements, assignments, waivers of attorney and other agreements in connection therewith as the or they may deem proper.

FURTHER RESOLVED, that any checks drawn on, and other withdrawals made from, the corporation's bank accounts heretofore, and any loans, advances heretofore had in or by the Trust Company with respect to checks or other instruments payable to the corporation, and any loans and discounts heretofore effected and at present outstanding with said trust company, and any endorsements, powers of attorney, assignments and pledges heretofore made to said trust company be, and the same are hereby ratified, approved and confirmed.

FURTHER RESOLVED, that a copy of these resolutions certified by the secretary or other officer of this corporation, together with a certificate of the secretary or other officer of this corporation authenticating the signatures of the officers of this corporation, be filed with Manufacturers and Traders Trust Company, with the definite understanding and agreement that said Manufacturers and Traders Trust Company will be promptly notified in writing from time to time of any changes or changes in said resolutions, or in the personnel of the officers authorized to act for this corporation as aforesaid.

I DO FURTHER CERTIFY that the persons whose signatures appear on the opposite side of this card have been duly elected, have qualified and are now acting as officers of the corporation in the capacity set opposite their respective names, and that their respective signatures are authentic.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said corporation this [illegible] day of [illegible] 19[illegible]

[illegible] Morley Construction Co.

[illegible]

(Seal)

F-227 CORPORATION

R

ACCT. OPENED BY

DATE APRIL 28-39

MORLEY CONSTRUCTION Co.

MANUFACTURERS AND TRADERS TRUST COMPANY

Below please find signatures of those authorized to sign checks, drafts, bills of exchange, acceptances, promissory notes and other orders and promises for the payment of money, and to transact other business for the above named company

It is understood that in receiving item for deposit or collection, this trust company acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This trust company will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This trust company or its correspondents may send items, directly or indirectly, to any bank including the payee, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this trust company not good at close of business on day deposited. The trust company reserves the right to charge the account with items of expense and service charges in connection therewith.

We declare that the certified copy of resolution contained on the reverse side of this card is embodied in the minutes of this corporation, is in conformity with the by-laws of this corporation, and is binding upon it.

In case this trust company is requested to stop payment on an item or items the depositor agrees to hold the trust company harmless for all expenses and costs incurred by the trust company in connection with refusing payment of said item, and further agrees not to hold the trust company liable on account of payment contrary to the request if such payment was made through inadvertence or accident, or if by reason of such payment other items drawn by the depositor are returned on account of insufficient funds. No stop payment request will be valid if oral, nor unless received at the office of the trust company where the account is kept

President

Vice President RESOLUTIONS - BACK OF CARD

Treasurer

Assistant Treasurer

Secretary [illegible]

Address

Assistant Secretary

Introduced by

INITIAL DEPOSIT $

F. 79 AUTHORIZED SIGNATURES OF

R.

ACCT. OPENED BY

DATE JUN 21 1933

√ H. F. MORLEY & MARYLAND CASUALTY Co.

M & T TRUST COMPANY

In receiving items for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This bank or its correspondents may send items, directly or indirectly to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited.

BOTH TO SIGN.

Signature H. F. Morley. JOINT CONTROL AGREEMENTS FILED

Signature (MARYLAND CASUALTY Co.)

THE COUNTER SIGNATURE OF MARYLAND CASUALTY CO. WILL APPEAR IN THE LOWER LEFT CORNER OF CHECKS IN THE FORM OF INITIALS AS NOTED ABOVE

Business

Address 724 M & T BLDG.

Initial Deposit $ 12.640- CH

Introduced by

Mrs. Miss Rev. Dr. Mr.

JK 10 Ed

I _____ of _____

do hereby appoint _____ of _____

Attorney, to draw and endorse checks; sign and endorse promissory notes; draw, accept and endorse bills of exchange; and to waive demand, notice and protest of all such papers; to make and execute any and all contracts; assign, pledge, sell and dispose of notes, bills, stocks, and bonds; and generally to transact any, and

all business for _____ with the

M & T TRUST COMPANY, to as full an extent as _____ could do if _____

were personally present and acting therein; hereby giving the said _____ full power,

and ratifying all _____ may do in the premises.

It is understood and agreed that this power shall stand irrevoked and in full force until notice thereof shall be given in writing

by _____ or _____

legal representative to said Bank.

IN WITNESS WHEREOF, _____ have hereunto set _____ hand this _____ day of

_____ A. D., 19____

_____ _____

Attorney.

_____ _____

Witness.

[fol. 99] J. FRANK MILLER was produced on behalf of plaintiff and testified that he was manager in Kansas City for the Maryland Casualty Company. Upon hearing of the Veterans' Bureau check having been sent to the Morley Construction Company, he called Herbert Morley on the telephone. I have known him for several years. I asked Mr. Morley if he had gotten the check and he said "Yes." I told him I wanted to know if he was going to send it back to Buffalo, and he said he couldn't tell me anything at all about it until Bernard got in town, and I told him I understood from the home office there was an agreement, that it was to go into the Buffalo bank. He said, 'I will look through my files,' so he called me back in a little while and said he found the letter, but couldn't find the contract, and if I would ask the home office to please send him a copy of that contract. He said that if the contract specified that the money was to be sent to Buffalo, he would send it back to Buffalo. In the last conversation I had with him, he said he was not going to send it back because it was a retent and not a final estimate. He did not know whether a copy of the contract was actually sent to Morley by the home office of the Maryland. He wrote a letter to the home office about the contract desired by Morley.

CLIFFORD L. JOHNSON testified upon behalf of the plaintiff that he was an insurance broker officing in the Maryland office at Kansas City and that he wrote the bond there. The first he heard about the Veterans' check was when Mr. Miller told him that if an agreement came in he wanted the witness to take it down to Morley Brothers. The next day I got in touch with you (Mr. Harris) and you had obtained the agreement by mail that morning, and I took the agreement down to Mr. H. F. Morley. That he went to the Morley office and was told by H. F. Morley that he would wait for Bernard to get back to town. He talked to Bernard on the telephone that night and asked him what he was going to do about the check. Bernard told him that he was sick and had just gotten in town that he wasn't going to do anything until he talked to his brother. The next morning he went to the offices and was unable to contact the Morleys.

I went back the next morning to find out, to tell them that you wanted to get in touch with them and that the home

office wanted to get in touch with them. They were in their office busy and couldn't be disturbed. I left word with their secretary or stenograper that it was very important that I see them, but I didn't see them. I then came [fol. 100] back to Mr. Harris' office and told him what happened. I later on tried to call them on the 'phone and couldn't get hold of them. I got word that they were busy and couldn't be talked to. That was Saturday morning, and then I went back and tried to get in touch with them around noon, but was unable to get them. I never got any response to that call.

Cross-examination:

Upon cross examination by Mr. O'Donnell he testified that he knew that they had a contract at Fort Sill at that time. He was not advised on the morning after Bernard Morley arrived that they were engaged in dealing with subcontractors on the Fort Sill Job. All he knew was that they said they were in conference and would not talk to him. He talked to Miss Merrell their stenographer.

Redirect examination:

On re-direct examination the witness stated that the Fort Sill contract was in the name of Morley Engineering and Construction Company. It originally operated as the Morley Brothers, a partnership.

James F. Kelly being recalled as a witness on behalf of plaintiff, having been previously sworn, testified that on Saturday, the 25th of November, when I received this communication from the home office of the Maryland, I called Kansas City on the telephone and asked the operator to get for me either Mr. H. F. Morley or Mr. B. D. Morley. That call was in all day. I continually called the operator to find out whether or not the Morleys would talk, and I never got them. The next day I was at my home, it being Sunday, and I had the call in all day Sunday and could not get either of the Morleys to answer my call.

PLAINTIFF'S EXHIBIT 7

"Contract and extras	$543,300.00		
"Received on contract	$390,210.00		
Balance Receivable		$153,090.00	
Bills payable	126,477.00		
Labor and material to complete	12,220.00	138,697.00	
			$14,393.00
Balance owed on plaster contract			$13,500.00
			$893.00

[fol. 101] Statement of Labor and Material to Finish

Finish wood flooring	$850.00	
Sand & Cement for cement floors	1,600.00	
Sand Cement for April	400.00	
Expansion joint to finish roads	370.00	
Coal in April	500.00	
Miscellaneous bills	500.00	
8 payrolls	8,000.00	
		$12,220.00"

Whereupon Plaintiff rested its case.

MOTION TO DISMISS

"Mr. O'Donnell: The defendants move to dismiss the bill for the reason that the evidence adduced fails to show any ground for the relief prayed for.

The Court: We will not attempt to pass upon the merits of that motion, and it is denied and overruled and exception allowed, and I will hear the whole case."

(To which ruling and action of the Court, the defendants, and each of them, by their counsel, at the time duly excepted and still except.)

Defendants' Case

BERNARD D. MORLEY, produced in behalf of defendants, upon direct examination by Mr. Ellison testified that he was a brother of H. F. Morley and was an indemnitor on the bond. The Batavia, New York Job was handled by the Morley Construction Company. The first he knew that the job was not going smoothly he received a long-distance call while he was in Colorado from H. F. Morley. That he was advised that difficulties had arisen with Giamberardino and his men, this was in April, 1933. He advised his brother that he would come to New York. He returned to Kansas City and took an airplane to Buffalo and arrived on the 24th or 25th of April. He found that Giamberardino's men had stopped work on the hospital. Giamberardino had the contract for furnishing plastering, including labor and material. The amount of the contract was in the neighborhood of $24,000, and at that time it was somewhere in the neighborhood of half through. Giamberardino was unable to complete it because he had not paid his men.

"Mr. Ellison:

Q. Why was he unable to complete it?

[fol. 102] Mr. Harris: If you know. I object to that as calling for a conclusion.

Q. Do you know?

The Court: Overruled, if you know.

A. Well, as I understand it, he was unable to complete it because his men refused to go on working for them until he paid them the money that he owed them.

Mr. Harris: I ask that be stricken out as a mere conclusion of the witness.

The Court: Sustained."

That Giamberardino wouldn't go ahead with the work, and after talking to his brother he went over to the Maryland Casualty Company where they talked with Mr. Kelly and Mr. Cushwa. That there was a general discussion as to the plasterers' claim, and the situation on the plastering contract. That Mr. Kelly and Mr. Morley agreed that the total of the plastering claims was around $11,000 or

$12,000. That Morley had two or three bids from outside contractors for the overage or additional cost to go ahead and complete the plastering contract. That they were in the neighborhood of $12,000 or $13,000. The general discussion was whether if Morley Construction Company received financial assistance in paying these claims, we could go ahead and finish the job. Mr. Cushwa asked whether if the Maryland took care of the claims filed by the Giamberardino plasterers on the original contract, the Morley Construction Company could go ahead and complete the job. That question was asked by Mr. Cushwa and Mr. Kelly, and both of us, H. F. Morley and myself, agreed that we could not go ahead and complete the job merely by the payment of the claims filed by Giamberardino's men; that there was going to be a shortage on that plastering contract that would run into quite a few thousand dollars; that we couldn't go ahead as long as that condition existed without further help. We simply said we couldn't prosecute the work under that condition unless we received additional help on it. The question of the bids and the amounts that would be necessary to complete the job was brought up and — sheet was typed by Mr. Kelly's stenographer and discussed. Finally Mr. Kelly and Mr. H. F. Morley agreed that the undisputed claims would be paid and the overage of the plastering contract that is the amount necessary to complete it over and above — was left in the Giamberardino account would be advanced, by the Maryland Casualty Company. That by overage was meant the cost of procuring another contractor to go in and complete the job, about the $24,000 in the original contract. Mr. Kelly and Mr. Cushwa agreed to [fol. 103] this but Mr. Cushwa didn't want to put it in writing. It was finally reduced to writing.

The contract was drawn up and dictated by Kelly with suggestions by Mr. Cushwa. That thereafter he went down to Batavia and stayed there approximately a week.

"Mr. Ellison:

Q. How much did they pay towards the carrying out of this agreement?

Mr. Harris: I object to that as calling for a conclusion. I have no objection to him asking how much they paid, but the purpose of it, I think is a conclusion.

Mr. Ellison: I thought I asked him how much they paid.

A. Shall I answer?

The Court: Yes.

A. They put up, as I understand it, $5,700, in conformity to that agreement, to pay the claims that we had already advanced, the money to pay Giamberardino's men, who got this money on undisputed claims for their work.

Mr. Harris: If the Court please, I ask that be stricken out as not responsive and a conclusion. The purpose of it and what he understood.

The Court: The question was how much money was paid by the Maryland Casualty Company. All of the answer excepting the answer to that question is stricken out."

Whereupon the Court stood at recess until Friday, September 28, 1934, at 9:30 a. m.

Bernard Morley resumed the stand on behalf of defendants and upon examination by Mr. Ellison testified that there was going to be $6,000 or $7,000 worth of undisputed claims. By undisputed claims was meant the claims of workmen who had not signed receipts and had not received their money that was to be paid.

"Q. What was meant by the 'disputed claims?'

Mr. Harris: Just a minute, if the Court please. I object to what was meant. I have no objection to what was said.

The Court: Sustained.

By Mr. Ellison:

Q. Were you familiar with the transactions which had caused these claims to accrue? Do you know about them, what they were of your own knowledge?

A. Yes, I knew from the discussion that went on in the office. Of course, I wasn't on the job all the time prior to that, but in getting the picture from Mr. H. F. Morley and hearing the discussion between Mr. Kelly and Mr. Cushwa and Mr. Morley, I arrived at the picture— [fol. 104] Mr. Harris (interrupting): I object to that, if the court please. If what you mean, Mr. Ellison, was that

there were certain claims that were disputed in a certain amount by reason of these receipts, or anything, I have no objection to his telling the amount if he knows it.

Mr. Ellison: That is all I meant.

Mr. Ellison:

Q. The reason I am doing this, Mr. Morley, is that in the agreement of April 28th, and in the letter which is a part of it, there is mentioned the unpaid plasterers' and laborers' bills, that is to say, $7,500, according to this letter, and then there is also mentioned some disputed bills, the laborers' claim that they had not received the full prevailing wage, although they have signed receipts for the full amount, that being said to be estimated at $5,000.

Are you familiar with the outcome of these claims; how much they eventually were?

A. Well, I know how much we paid. I know how much we actually paid out on the claims. That was somewhere in the neighborhood of $5,700. That was the actual amount that was paid out in Batavia or Buffalo; I don't know which town they were paid out in.

Q. Was that the undisputed or the disputed item?

A. That was required by the Conciliator for the Department of Labor. It was required by him; that had to be paid.

Q. What happened to the disputed claims?

A. Well, they are still up there, as far as I know. They were never paid. They never insisted upon us paying them.

Q. Well, is it true they were excused payment of them?

A. I don't know, to say we were excused. The Veterans' Bureau said we didn't have to pay them.

Mr. Harris: I object to that. I do not see the materiality of that; they were not paid.

The Court: Overruled. What did you have to do with that money, if you received it?

A. Pay the bills on the job. We never had any other intention, but to pay those bills.

The Court: That seems to be all the plaintiff wants. I do not know what we are fighting about in this case.

A. Your Honor, might I say something at this time to you?

The Court: Yes, sir.

A. I think I can give you my side of the picture or our side of this picture in a very few words. That is, with this $59,000, this final payment, and with the money in the joint account in the bank at Buffalo, and with the [fol. 105] money that should have been advanced on this plaster-s' overage, that is, the Hudson contract and the labor and the material to complete that contract, if that money had been advanced, plus the money that we could have made arrangements with the bank to borrow, every bill on that job could have been paid and would have been. But it couldn't be paid if they had the Maryland standing in there supervising everything, and if we made a deal with somebody and say we will pay you this much, we want to be able to get a check and get a release in full from that job.

Mr. Harris: If the Court please, I think that, as a matter of evidence, should be stricken.

The Court: That is not a part of the evidence; that is just a little conversation between the Court and this witness.

Mr. Harris: I have no objection to that."

The witness testified that claims had been settled on the basis of 60c cash on the dollar and giving a note for the balance; that the creditors have given them a release on their job and their claim against the bond. The money was paid out of the joint account at Buffalo and the checks made out and sent to Buffalo, and they were countersigned by Mr. Kelly or somebody in the office and the checks were paid. It was our intention in the event we were able to recover against the defaulting contractors or their sureties, to eventually pay these notes so that the creditors would be paid in full as that is the only way that we can keep on doing business, to pay those bills.

That at the meeting prior to the drawing of the contract of April 28, the Morleys had bids from various people for the completing of the plastering. They were in neighborhood of $12,000 or $13,000. It was left up to the Morleys to decide the reasonableness of these bids. These amounts were freely discussed at the meeting and the contract was drawn up the next day. That he returned from the Fort Lyons job on Friday afternoon and went to the office. He had been sick with the flu in Colorado and remained in the office about an hour and a half and then

went home. As I remember it, I believe that Mr. Johnston either called or came in. I don't remember exactly which way he did it, and said something about it. I said "I haven't had time to talk to H. F. and I don't understand about it, but I am going home, I am sick. I will talk to him or try to talk to him tomorrow" and in the morning when I came down to the office I talked to H. F. about it. I mentioned it and said "what is this trouble about the check?"

[fol. 106] At that time the Fort Sill job was just beginning and he had received notice to proceed with the work. When he arrived at the office there were ten or twelve men waiting to see him about the Fort Sill job in order to sell materials. He knew the Maryland was trying to reach them the day before, but on Saturday the only information he had was that his secretary told him there was a long distance call from New York and did not tell him who was calling. He instructed her that he was not receiving any calls. He and H. F. Morley were interviewing materialmen about the Fort Sill job. He told the Secretary that he did not want to be disturbed in order to talk to four or five men who wanted to sell him material. It was a matter of extreme urgency to get the Fort Sill job started. The amount of that job was $215,000 or $216,000. The bills were paid every month, and at the present time it is 95% completed. The contract price of the Fort Lyons Job was $331,000 and some odd hundred dollars. That job is complete. All claims on the Fort Lyons job have been settled in full, with the exception of five or six disputed bills.

"Q. Has the Morley Construction Company anything coming from that job?

A. Yes, they have three claims that have been approved by the Director of Construction in Washington of the Veterans' Administration Bureau, which are in the general accounting office and come up the second week in October.

Mr. Harris: I ask that that be stricken out.

The Court: That will be stricken. It has no bearing upon this case at all.

Mr. Ellison: We will except in so far as the complaint alleges insolvency and intent to escape payment of these bills from the Batavia job.

The Court: It alleges insolvency as of the date of the filing of the bill.

Mr. Harris: This job is not a Morley Construction Company job.

Mr. Ellison: I will withdraw the question.

A. The Fort Lyon job is a job of the Morley Construction Company, and if your Honor please, the money—I don't guess this ought to go into the evidence.

Mr. Harris: I object to his statement.

The Court: Yes.

Mr. O'Donnell: Mr. Harris went to great pains to prove how insolvent it was now.

The Court: Some of his questions indicated that, but the evidence was restricted to the date of the filing of his bill, [fol. 107] and he said in answer to the Court's question that his questions were restricted to that date.

Mr. Ellison: I understand there is no question as to its present solvency then?

The Court: I don't understand that there is.

Mr. O'Donnell: If your Honor please, you asked if there was any way to end it. We will be glad to do it. The fact is, Mr. Morley will tell you that after this suit was filed he offered to go ahead and let this money be deposited here in a joint account so they could operate, if they would dismiss their suit and they wouldn't do it. Now if something like that would happen, I don't know whether they would be willing to do that now or not.

The Court: Is that acceptable to you now?

Mr. Harris: From the very beginning we agreed that if that money would be deposited in a joint account any where to apply on these accounts, it would be satisfactory, but Mr. O'Donnell said, 'We will not do it because you have done us this damage, and we are going to hold you for damages and the injury you have done to us.' That is the only thing. I have written letter after letter making a record on this very thing, that at any time they are willing to do it——

Mr. O'Donnell: Now, if your Honor please——

Mr. Harris (interrupting): Every time the thing that has held us up is that Mr. O'Donnell says, 'We won't do it.' I even prepared a decree and submitted it to him. He said: 'You have done us a lot of damage.' I said, 'We will take

all of the sting out of that', and I prepared a decree and submitted to him to enter in this case to show we had no bad motives in tying up this money, but he insists we have damaged his client and have to pay him.

Mr. O'Donnell: The gentleman is mistaken about that. He said that he would be willing to do it if these folks would sign a release to them for having brought this suit, and I don't see why they should, if your Honor please, because it would be an admission that they had a right to charge him with what they charged him with.

Mr. Harris: Since then a half dozen times I have said, 'We will dismiss the suit and bring it any where you want to so you may have your claim against us—any claim you have—we will dismiss this suit if you will put this money any where in the United States under joint control, and we will do it.' I have told him that time and time again.

The Court: Then I don't see why you can't agree.

The Witness: If you Honor please, will you let me give you a little picture that Mr. Harris don't know about?

[fol. 108] The Court: I understand that Mr. Harris says that he is willing to dismiss this suit if this money is deposited in a joint account to be disposed of under the joint control of the plaintiff and defendants, and that he is willing to dismiss it without any restrictions upon the right of the defendants to bring any suit they want to bring, if I understood him correctly.

Mr. Harris: That is right.

Mr. O'Donnell: May we have a ten minutes' recess, your Honor to discuss this matter?

The Court: Certainly.

(Whereupon a ten minutes' recess was taken, following which the following further proceedings were had:)

Mr. O'Donnell: We have not been able to agree, if your Honor please.

Mr. Harris: I will say, if I may make the offer, if it is proper, what we are willing to do; we are willing that this fund may be deposited in any reputable bank in Kansas City, or elsewhere, to be designated by these defendants, and used for the purpose of paying bills for labor and materials on this job; that we will counter-sign any check subject to counter-signature, and we will counter-sign any check that is on a bill for labor and material that they say is a proper bill against this job.

Mr. O'Donnell: Our clients say that since the things that have developed, that they do not want any joint control.

Mr. Ellison: However, your Honor, since he has stated what they are willing to do, we offer to deposit this money in the First National Bank here or any other bank, together with a list of all the bills payable on this job, with instructions on the bank that no check should be paid except in the reduction or settlement of one of those bills, and the further provision that any expenses of prosecuting these claims against defaulting contractors or the government should also be paid from this fund.

Mr. Harris: Subject to our supervision.

Mr. Ellison: We object to the joint control.

The Court: Continue with the cross-examination of the witness.

Cross-examination:

Upon cross-examination Mr. Bernard Morley testified that when the job first started in the fall of 1932 he went to Batavia and stayed three or four weeks assisting in putting up the equipment and machinery. He then left and returned about once a month. At the time of the meeting in Buffalo, the work had not entirely stopped. There were some carpenters and some laborers working, but the plas- [fol. 109] tering work had stopped which was the main part at that time.

The Morley Construction Company was not then in a financial condition to continue the work without assistance. Morley Construction Company had no means of getting financial assistance except from the Maryland. I told Mr. Cushwa that it was either stop the job or the Maryland come in and help us. He told Mr. Cushwa that if the Maryland did not help they would have a hospital on their hand. Then this agreement as of April 28 was made. There was no understanding that all of the moneys from the job should go into the joint account.

As to what was said about whether anything should be excepted, I haven't been so positive about it. As I recall the first conversation after we had worked out the situation of what we were going to do, the question of money came up, as to who was to advance the money and how much was to be advanced and how much would be neces-

sary to complete the job, and before any agreement was made as to this additional $5,000.00, that was to be put up jointly, each one to put it up, the suggestion was made by Mr. Cushwa for Mr. Kelly, that we take the money out of the Fort Lyon job and complete the job, which I refused to sanction because the Fort Lyon job had been kept entirely separate from the Batavia job. Then the suggestion was made that I borrow money from the bank personally or else the construction company, to finish the job and I couldn't agree because they had asked that the money be put under joint control. It was the idea that the money on all the estimates should be put under joint control. The only thing that I remember about is that if the money advanced by the Maryland Casualty Company and the money we put up was going to be sufficient to pay the liabilities it was our idea at the time, and was discussed, that we would pay the final bills on the job, not the Maryland would pay the final bills, but what was being paid was being paid under the joint control of the Maryland. I don't know that it was ever agreed that any part of the money that came from the government was not to go into this joint account, and I don't recall that there was ever anything said or discussed about the final check. The only thing that was discussed was the estimate checks. That's what the main conversation was.

The only thing that was discussed were the estimate checks. They were made up by the Superintendent on the job for the Veterans' Administration. Mr. Frizzell made the preliminary statement of the work he considered done and took it to Mr. Clipman who compiled the estimate and sent it to Washington then the check came back. The check [fol. 110] involved in this case covered the final payment on the job, it was not an estimate.

Q. You know that the excess over the retent was the final estimate, don't you?

Mr. Ellison: We object his asking about an estimate when there isn't any evidence whatsoever that this last $59,000 was based upon an estimate.

Mr. Harris: Well, he is going to tell that before he gets through if you will let him alone."

The final voucher was comprised of the retent on the previous payments plus any balance that was left on the contract after extras and credits had been deducted. It was not a final estimate. The final check was computed by taking the contract price and subtracting what had been paid to the Construction Company; the difference between the retent and the amount of the check was not based on a final estimate. The Morley Construction Company owes the witness $10,000 or $12,000 for money advanced at different times to that job and the Fort Lyon job. The $5,000 deposited in the joint account was loaned by the witness. Several times prior to November 28, 1933 the witness advanced money on the job. He has advanced none since that time. He was unable to state how much. The Fort Lyon job started in January, 1933 and lasted through 1933. He had been repaid for the money advanced on that job. The Fort Sill job is 95 or 96% completed. There was no profit in the Fort Lyon job except some claims.

B. D. Morley doing business as the Morley Construction Company had a job in Idaho. There is a judgment against the Seaboard Surety Company who was surety for B. D. Morley on that job for about $7,000. The suit was not brought against Morley, but against the Seaboard Surety Company for bills of a sub-contractor.

The witness stayed in Batavia for several days after the conference and then went to Washington with Mr. Cushwa in order to get an extension of time on the job. There was a delay on the grading at the wind up of the job, but the plastering went ahead without delay. About 10 or 15 claims have been settled since the filing of this suit from the joint account. A claim against the New Amsterdam for $13,400 which was received in December, 1932 went into the job at Batavia.

Redirect examination:

The judgment mentioned by Mr. Harris in Idaho has been appealed. Defendants' Exhibit 5, a statement of the Cost of Plastering Contract to complete the work from the time of the default of the original contract. The amount [fol. 111] was $17,689.29, of which $5,746.53 was paid by the Maryland.

Defendants' Exhibit 5 was offered and received in evidence and is as follows:

"DEFENDANT'S EXHIBIT 5

Copy

D. Giamberdino & Son

Statement

August 22, 1933.

Plaster Contract	$24,450.00
Extra Work	154.60
	$24,604.60
Payments & Back charges to Apr. 14, inclusive	10,380.56
	$14,224.04

Cost of Plastering work, Apr. 14 to Aug. 22, Inclusive:

Item No.		
1	Wm. H. Robinson, Attorney	$241.50
2	Lucian F. Nowak, Stenographer	193.00
3	Photographs of Defective Plaster and Affidavits	20.50
4	452 Sks of Cement @ $.45	203.40
5	280½ Yds. Sand @ 75c	211.34
6	Batavia Lumber & Coal Co., Plaster Mt'l. for months of Apr., May, June & July	4,532.80
7	Express on Plaster Sample	.44
8	Laboratory Tests on Defective Plaster	50.00
9	Edward M. Kearney, Legal Services	3.00
10	Telegraph Charges (4/12 to 5/5)	20.18
11	8 Tons of California Stucco	332.00
12	Telephone Tolls (4/12 to 6/28)	137.77
13	James Quinn (Plastering Work)	137.50
14	Special Size Coat on Defective Plaster in Residence & Utility Bg.	369.29
15	H. F. Morley (Traveling Expenses)	24.00
16	B. D. Morley (Traveling Expenses)	200.00

"Defendant's Exhibit 5—Continued

17—Paul Squires (Cleaning Door Frames)	100.00	
18—Laney & Silvernail (Cleaning window frames)	137.60	
[fol. 112] 19—Replacing Broken Glass	180.79	
20—Lumber for Protection of Slate Treads	42.71	
21—Labor Cleaning Floors & Grounds and Patching Plaster	3,580.17	
22—Cleaning Plaster from Window Glass	275.00	
23—Hudson Plastering Co.	15,139.68	
24—Labor Claims paid by Maryland Casualty Co.	5,746.53	
25—Cleaning Supplies & Tools	30.90	
26—Genessee Lumber & Coal Co., Plaster Matl.	3.23	
		$31,913.33
		$17,689.29

Overage—Add Interest"

George A. Berry testified on behalf of defendants as follows: That he was Ex-Vice-President and Treasurer of the American Terra Cotta Company, and also a practicing attorney. That the American Terra Cotta Company had a contract with the Morley Construction Company to furnish the terra cotta on the Batavia job also on the Fort Lyon Hospital. There is approximately $3,000 still due from the Batavia job. The terra cotta company has intervened in the suit in Federal Court in Buffalo. He had seen the pleading filed by the Maryland Casualty Company in response to the suit. He has either an original or copy of this in his office in Chicago.

"Q. Now, Mr. Barry, can you tell the Court in substance what the allegations are in the document you have mentioned?

Mr. Harris: If the Court please, I object to that.

The Court: Sustained.

Mr. Ellison: We offer to prove by this witness that the answer filed by the Maryland Casualty Company in the United States Court at Buffalo, New York, denies liability upon this bond that we have mentioned in the petition here and upon which, as I understand it, they admit they are liable. We offer this for the purpose of directing the Court's attention to the fact that since a litigant must come into Court with clean hands, they should stay clean. If they take a position different in Buffalo from what they take here, it is proper to show it.

[fol. 113] Mr. Harris: We object to the offer.

The Court: Sustained.

Mr. Ellison: The only objection he is making is that it is not the best evidence.

Mr. Harris: It is not the best evidence and not the proper way of proving the contents of the writing.

Mr. Ellison: It is beyond the jurisdiction of the Court and is not here, and if I understand it, when it is beyond the jurisdiction of the Court and can't be brought in in that way, it is proper to give evidence as to what its contents are. If that is the only objection——

Mr. Harris (interrupting): And for the further objection that it is entirely immaterial and doesn't prove or tend to prove any issue in this case, if we admit in this pleading that we are liable.

The Court: I have already ruled on the objection.

Mr. Ellison: That is all, thank you, sir."

Thereupon the witness was excused.

Mr. Bernard D. Morley recalled as a witness on part of defendants testified that at the time of the conference in Buffalo H. F. Morley prepared an estimate of the cost of the completing the plastering contract. Plaintiff's Exhibit 7 where it states, "Balance owed on plastering contract $13,500." Does not mean that that is owed by the government, but that was the amount unpaid on the Giamberardino contract by the Morleys not by the government.

Redirect examination:

Bernard D. Morley upon redirect examination testified that the final amount due as shown by Exhibit 4 including retained percentage was $59,780.22.

Thereupon the witness was excused.

Herbert F. Morley resumed the stand as a witness on behalf of defendants and upon direct examination testified that Exhibit 5 was a statement of the total cost of finishing the plastering contract; it was submitted to Mr. Kelly.

Mr. O'Donnell:

"Q. And you may state whether it was accompanied by a demand that his company deposit the amount called for in this joint account?

A. I didn't get the question.

Q. You may tell the Court whether or not you demanded that he have his company deposit the same amount shown there on that list in the joint account?

A. No, sir, I did not.

Q. Why did you give it to him?

[fol. 114] A. I gave it to him at his suggestion so that we could go over and present it to the attorneys in Buffalo with the idea in mind that they would be pressing the claim against the National Surety Company.

Q. Were those charges that you understood under the contract they were to take care of by this deposit.

Mr. Harris: I object to that as a conclusion.

The Court: Sustained.

Mr. O'Donnell:

Q. You may tell his Honor how you had agreed with these gentlemen as to who would deposit the money to take care of those expenses?

Mr. Harris: If the Court please, I object to that. The written contract is the best evidence of that.

The Court: Sustained.

Mr. O'Donnell:

Q. What was your understanding of that contract with reference to that matter?

Mr. Harris: I object to that as asking for a conclusion of the witness.

The Court: Sustained.

Mr. O'Donnell:

Q. I will ask you this: Who was to determine whether or not those charges were reasonable and satisfactory?

Mr. Harris: I object to that as a conclusion.

The Court: Sustained.

Mr. O'Donnell: I offer to prove by this witness that the Morley Construction Company was to determine that fact and that they did determine that fact and so advised Mr. Kelly.

Mr. Harris: I object to that for the same reason.

The Court: Sustained.

Mr. O'Donnell: That is all."

(Witness excused.)

Whereupon, the defendants rested their case.

Mr. Harris: That is all.

Whereupon, the plaintiff rested their case.

ORDER APPROVING STATEMENT OF EVIDENCE

And the foregoing was all the evidence introduced. The foregoing narrative statement is hereby allowed and approved as true, complete and properly prepared, and is ordered to be filed and made a part of the record herein this 23rd day of September, 1935.

Merrill E. Otis, District Judge.

[fol. 115] AGREEMENT AS TO STATEMENT OF EVIDENCE

It is hereby agreed that the above and foregoing is a true and correct abstract of all the evidence in the trial of the above entitled cause.

Harris & Koontz, Attorneys for Plaintiff. Martin J. O'Donnell, Robert F. McKinstry, Andrew Ellison, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed October 14, 1935

For good cause shown it is ordered that the time for filing the transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit on the appeal heretofore allowed herein be, and the same is hereby extended for a period of twenty days from and after October 17, 1935.

October 14, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Memorandum Opinion, Findings of Fact, Conclusions of Law, Indicated Decree—Filed October 2, 1934

Introductory

This is a proceeding in equity wherein the plaintiff having executed a surety bond for the defendant in connection with a construction contract entered into between the defendant and the United States seeks: (1) exoneration from the defendant an account of obligations under the bond to creditors of the defendant; (2) subrogation to defendant's claim against the United States by reason of alleged payments made by plaintiff to certain of defendant's creditors, and (3) specific performance of a certain contract entered into between plaintiff and defendant. The answer of the defendant to plaintiff's bill includes: (1) a motion to dismiss the bill for want of equity, (2) a denial of essential allegations of the bill, and (3) a cross-bill. The prayer of the cross-bill is that the plaintiff be required to dismiss a certain related proceeding in equity heretofore instituted by it in the Supreme Court of the District of Columbia. [fol. 116] A fuller understanding of the nature of the case will be had from a consideration of the following formal findings of fact.

Findings of Fact

1. The Morley Construction Company, a Missouri corporation, engaged in the general contracting business, on July 28, 1932, entered into a contract with the United States of America, under which is agreed to furnish all labor and material for and to fully construct and complete a veterans' hospital at Batavia, New York, for the sum of $540,300. The Maryland Casualty Company, a Maryland corporation, as surety for the Morley Construction Company, executed a bond to the United States with a penalty of $275,000, conditioned upon the completion by the Construction Company of the veterans' hospital at Batavia, New York, as provided in the contract between that company and the United States; conditioned also upon the payment by the defendant, the Construction Company, of all bills for labor and material used or consumed in the construction called for in the contract. The contract of the Construction Company with the United States has been completed and the work done accepted. The United States is indebted to the defendant under the contract in the amount of $59,780.82.

2. On or about April 27, 1933, while the Construction Company was engaged in carrying out its contract with the United States, it became involved in financial difficulties and was unable to proceed with its contract without pecuniary aid from the Casualty Company. Thereupon an agreement in writing was entered into between the Construction Company and the Casualty Company, whereby the Casualty Company agreed to advance to the defendant and to deposit in a joint account of the Casualty Company and the Consfruction Company in the M & T Trust Company, in the City of Buffalo, New York, the sum of $5,000, and the Construction Company agreed to deposit in the joint account the sum of $5,000, all sums deposited in said account to be used in completion of the contract between the Construction Company and the United States. It was further stipulated in this written agreement that the Casualty Company, in addition to the $5,000 to be deposited by it in the joint account, would advance to the defendant and deposit in the said account a sufficient sum of money to pay off all plasterers' claims unpaid and a further sufficient sum of money to complete the plastering. It was further stipulated in the said written agreement that all estimates

and moneys thereafter received from the United States by the Construction Company on the contract between that [fol. 117] company and the United States should be deposited in the joint account. It was intended and understood by the parties to the agreement and it was a part of that agreement that the moneys received from the United States to be so deposited should include the final payment under the contract made by the United States to the Construction Company, as well as all other payments under the contract made by the United States after April 27, 1933.

3. Pursuant to the agreement referred to in finding of fact No. 2, the Casualty Company and the Construction Company deposited $5,000 each in the joint account and the Casualty Company made a further deposit in the joint account of $5,700 but it did not deposit in the joint account a sufficient sum of money to complete the plastering contract. Pursuant to the agreement all money which the Construction Company received from the United States under the contract, except the final payment of $59,780.82, were deposited in the joint account. All sums so deposited, except a small unexpended balance, were used to pay labor and material bills.

4. By direction of the Construction Company and notwithstanding the agreement referred to in finding of fact No. 2, the United States sent its warrant on the treasury for $59,780.82 not to the M & T Trust Company of Buffalo as other warrants had been sent after the agreement was entered into, but to the Construction Company at Kansas City, Missouri. The warrant was by the Construction Company deposited for collection with the Merchants Bank in Kansas City. That bank was directed by the depositor to make out a cashier's check payable to H. F. Morley, trustee (H. F. Morley was President of the Construction Company) and to deliver the cashier's check to him when the government warrant had been paid and its proceeds received by the Merchants Bank. Learning these facts the Casualty Company filed in the Supreme Court of the District of Columbia a bill in equity praying an injunction restraining the treasury of the United States from paying the warrant when presented. In that proceeding a restraining order was issued which has since been and now is in force. The warrant has not been paid. The Construction Company never has received the final pay-

ment from the United States of $59,780.82 nor any part of it and cannot receive it until the restraining order issued by the Supreme Court of the District of Columbia is set aside by that court. The Casualty Company filed its bill in this case after it had filed its bill in the Supreme Court of the District of Columbia.

[fol. 118] 5. At the time the agreement referred to in finding of fact No. 2 was entered into between the Construction Company and the Casualty Company, the Construction Company was insolvent and it was insolvent when the bill in this case was filed.

6. When the bill in this case was filed there were claims against the Construction Company for labor and materials furnished on its Batavia contract in an amount exceeding $100,000, which were due and payable. The time at which suits might be independently filed against the Casualty Company as surety for the Construction Company on account of claims for unpaid labor and material bills had not yet arrived when the bill was filed.

7. While it was not the intention of the Construction Company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract, the Casualty Company had reason to apprehend that such was their intention.

Opinion

Before the trial of this case the defendant moved to dismiss the bill. That motion was overruled. The same motion renewed in the answer should be overruled. The facts pleaded in the bill, if proved, are quite sufficient to entitle the plaintiff to some equitable relief.

Three species of relief are sought by plaintiff, namely, exoneration, subrogation, and specific performance. In my view of the case, considering the facts as found, the plaintiff is not entitled to subrogation. The sum of $10,800 which it contributed to the joint bank account referred to in finding of fact No. 3 and which was used in the partial payment of claims against the defendant in reality was money loaned by the plaintiff to the defendant under the agreement referred to in finding of fact No. 1. It was not

money the plaintiff was required to pay out because of its suretyship obligation but which, to save itself from a future possible but not then existing liability on its bond to the United States, it voluntarily advanced to enable the defendant to complete its contract with the United States. Nor, in my view of the case, is the plaintiff entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. The plaintiff did not itself discharge all of its obligations under that agreement. Moreover the defendant never has received the final payment due it from the United States and could not now comply with a decree concerning the disposition of that specific fund. Specific performance is impossible.

[fol. 119] But the plaintiff is entitled to exoneration by the defendant. When its bill was filed the claims against defendant of those who had furnished labor and materials on the Batavia contract in the amount of more than $100,000 had matured and were due and payable. Immediately that became true the plaintiff's liabilities arose. Contemporaneously with the beginning of its liability its right to exoneration in equity came into being. "No principle in equity is more familiar or more firmly established than that a surety, after the debt for which he is liable has become due, without paying or being called on to pay it, may file a bill in equity in the nature of a bill quia timet to compel the principal debtor to exonerate him from liability by its payment." 21 R. C. L. 146; 50 Corpus Juris, 244.

Learned counsel for the defendant do not question the legal principle just stated. They contend, however, that because under a federal statute, U. S. C. Title 40, Sec. 270, no labor or material claimant could independently sue the plaintiff upon its bond until after six months from the completion of the contract therefore the right to exonerate did not begin until the expiration of the six months' period which in this case was subsequent to the filing of the bill. But, under the rule stated, the right to exonerate begins when liability begins. The cited statute in effect provides that the surety's liability shall begin when the principal fails promptly to pay those furnishing labor and materials.

The plaintiff then is entitled to a decree requiring the defendant to pay all labor and material claims arising in

connection with the Batavia contract for which the plaintiff is liable under its bond and to apply to such payment any money it has or will realize from assets now possessed by it, including its claims against the United States on account of that contract.

Conclusions of Law

1. Plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2.

2. Plaintiff is not entitled to a decree that it be subrogated to any part of the plaintiff's claim against the United States for the final payment due from the United States referred to in finding of fact No. 1.

3. Plaintiff is entitled to a decree requiring the defendant to pay the labor and material claims arising in connection with the Batavia contract for which the plaintiff is liable as surety and so to exonerate the plaintiff.

[fol. 120] 4. Defendant's cross-bill should be dismissed.

Exceptions Allowed

The defendant is allowed exceptions to the conclusions of law herein stated and to each of them. The plaintiff is allowed exceptions to conclusions of law Nos. 1 and 2. The defendant has filed in writing a request for conclusions of law numbers 1 to 7, inclusive. To the extent that any of these requested conclusions of law have not been given defendant is allowed an exception.

Indicated Decree

Counsel for plaintiff will prepare and submit for approval and entry a decree in conformity with the foregoing opinion, findings of fact and conclusions of law.

Merrill E. Otis, District Judge.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 121] Appearances of counsel omitted in printing.

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

ORDER OF SUBMISSION—May 6, 1936

This cause having been called for hearing in its regular order, the same was argued by Mr. Martin J. O'Donnell for appellants and by Mr. Spencer F. Harris for appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to appellant to file reply brief within five days.

[fol. 123] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, A. D. 1936

No. 10,477

MORLEY CONSTRUCTION COMPANY, a Corporation, and MERCHANTS BANK OF KANSAS CITY, MISSOURI, a Corporation, Appellants,

vs.

MARYLAND CASUALTY COMPANY, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Martin J. O'Donnell (Mr. William Buchholz was with him on the brief), for Appellants.

Mr. Spencer F. Harris (Mr. Paul G. Koontz was with him on the brief), for Appellee.

Before Gardner, Sanborn and Booth, Circuit Judges

OPINION—June 22, 1936

BOOTH, Circuit Judge, delivered the opinion of the Court:

This is a suit in equity brought by the Maryland Casualty Company against the Morley Construction Company and the Merchants Bank of Kansas City, Missouri. Diverse citizenship is alleged and admitted.

[fol. 124] It appears that plaintiff executed a surety bond for defendant Morley Construction Company in connection

with a construction contract entered into between said Morley Construction Company and the United States. The bond, dated on or about July 28, 1932, was in the standard form of performance bonds.

The term "defendant" hereinafter used means the Morley Construction Company.

Plaintiff seeks by its complaint the following relief: (1) exoneration by the defendant from payment of any bills for labor and materials furnished under said construction contract; (2) subrogation to defendant's claim against the United States by reason of certain payments alleged to have been made by plaintiff to creditors of the Morley Construction Company; (3) specific performance of a certain contract (Exhibit "A") entered into between plaintiff and said defendant subsequent to the making of said bond.

As to Specific Performance of Exhibit "A"

It appears that in carrying out the construction contract, the defendant, Morley Construction Company, became involved in financial difficulties, and an agreement (Exhibit "A", set out in the margin*) was entered into between it

---

* "Exhibit A

Agreement

"Whereas the Morley Construction Company of Kansas City, Missouri is the General Contractor under a contract with the United States Government for the construction of the Veterans' Administration Hospital at Batavia, New York, said contract bearing date of July 23, 1932, and

"Whereas the Maryland Casualty Company executed a bond bearing date of August 1, 1932, wherein and whereby said Maryland Casualty Company guaranteed the faithful performance of the above mentioned contract, and

"Whereas the Morley Construction Company has encountered financial difficulties in the construction of said Veterans' Administration Hospital and has called upon the Maryland Casualty Company for financial assistance in regard to the completion of said contract in accordance with a letter to the Maryland Casualty Company from the Morley Construction Company bearing date of April 27, a copy of which is hereto attached and made a part of this instru-

and the Maryland Casualty Company, whereby the Casualty Company agreed to advance to the Construction Company the sum of $5000 to be placed in a joint account. The Casualty Company also agreed:

[fol. 125] "Fifth. The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory."

The Construction Company also agreed to place a certain amount in a joint account.

The Casualty Company did not fulfill all of the covenants assumed by it in the agreement. On cross-examination, the witness Herbert F. Morley, president of the Morley Construction Company, testified as follows:

---

ment, in consideration of the mutual promises of the parties hereto it is mutually agreed as follows:

"First. The Morley Construction Company hereby agrees to deposit at the M & T Trust Company in the City of Buffalo, New York, the sum of Five Thousand ($5,000.00) Dollars and to deposit from time to time certain other sums of money to be used toward the completion of said contract. The Morley Construction Company further agrees to deposit in said account for the benefit of said contract all moneys and estimates received from the United States Government because of said work.

"Second. The Maryland Casualty Company hereby agrees to deposit in said M & T Trust Company to the account of the Morley Construction Company the sum of Five Thousand ($5,000) Dollars.

"Third. It is mutually understood and agreed that the said Maryland Casualty Company shall have joint control of all moneys deposited in said account and that no check, draft or withdrawal order shall be drawn on said account and paid by said bank without the approval of the said Maryland Casualty Company by its representatives, James F. Kelly and/or Martin C. Schaus, said approval to be designated on said check, draft or withdrawal order by the

"Q. I see where the petition states that they agreed to pay off plasterers' claims and also sufficient money to complete the plastering contract. Could you tell the Court the sum total of those two items, that is, the expense of this [fol. 126] plastering contract, that is, those that had not been paid, and also sufficient to complete the plastering contract? What is the total of that, if you know?

"A. Well, they paid $10,700 and some odd dollars. They paid $5,000.00 and they paid $5,740.00 toward the completion of the plastering contract. • • •

"Demand was made on the Maryland by the witness for them to pay the plastering. The new subcontractor was the Hudson Plastering Corporation. The final bill for this plastering was $15,000 of which $7,500 was unpaid. When the witness requested Kelly to give him money to pay the first payment at the end of the first month's work by the Hudson Plastering Company, Kelly advised him to pay it out of the funds of the joint account.

"Q. Well, did he say anything as to whether he would or wouldn't carry out his contract?

"A. Not at that time, no, sir.

"Q. Did he at any other time?

"A. Yes, sir.

"Q. What was it he said?

---

initials of the above individuals, to-wit, J. F. K and/or M. C. S.

"Fourth. The Morley Construction Company hereby agrees to pay back to the Maryland Casualty Company the aforementioned sum of Five Thousand ($5,000.00) Dollars out of the proceeds of said job if there be sufficient money and if not, they thereby bind themselves and agree to pay said money themselves to the Maryland Casualty Company.

"Fifth. The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory.

"A. Well, when the next month's payment came due, the first month's payment amounted to approximately $7,500 and request was made that the money be advanced and he advised that I pay it and take care of it out of the funds of the joint account. The next month's account came due and left a balance of $2,500 on the previous month, together with about $6,000 from the ensuing month, and he suggested that I take care of that out of the funds in the joint account, and there wasn't enough money available for that, so in order to keep the plastering contractor on the job and have him finish up, I did finally pay him $2,500 out of the joint account and whether at that time or within a few days after that, when I discussed it with him again, Mr. Kelly made the remark that the Maryland Casualty Company was not going to put any more money into that account or that job.

"(The witness made no further demand upon Kelly for payment.)"

The witness Kelly, an attorney employed in the office of the Casualty Company at Buffalo, New York, testified as follows:

"In addition to the $10,700 the Maryland agreed to take care of the disputed plastering claims if the Veterans' Ad- [fol. 127] ministration ruled that it was necessary to pay

---

"Sixth. The Morley Construction Company hereby agrees to pay to the Maryland Casualty Company any and all moneys advanced to them for payment of plasterers' claims or other laborers' claims on the D. Giamberardino & Sons contract and any and all moneys advanced by the said Maryland Casualty Company to assist in the completion of the D. Giamberardino & Sons contract.

"Seventh. The Morley Construction Company hereby agrees to give a note in the sum of Five Thousand ($5,000.00) Dollars bearing even date of this instrument to the Maryland Casualty Company as security to them for the payment of the sum of Five Thousand ($5,000.00) Dollars mentioned in Paragraphs Second and Fourth in this instrument.

"Dated April 28, 1933.

Morley Construction Company, by H. F. Morley, President. Maryland Casualty Company, by James F. Kelly."

them. They were never paid because it was ruled that the Veterans' would stand on the receipts as given by the employees. The letter to the Veterans' Administration, Plaintiff's Exhibit 4, the witness thought had been dictated by B. D. Morley, and Mr. Cushwa. At the time, Herbert Morley and the witness discussed the payment of the plasterers' bills. There was an estimate coming due on the job and the witness said to Mr. Morley, 'Are you going to pay that part on the plaster contract out of the estimate, just as we understood,' and Morley did so. That Morley did ask him to pay the Hudson claims and he told him to pay it out of the estimate coming due."

The Court found as to this matter as follows:

"It was further stipulated in this written agreement that the Casualty Company, in addition to the $5,000 to be deposited by it in the joint account, would advance to the defendant and deposit in the said account a sufficient sum of money to pay off all plasterers' claims unpaid and a further sufficient sum of money to complete the plastering. * * *

"Pursuant to the agreement referred to in finding of fact No. 2, the Casualty Company and the Construction Company deposited $5,000 each in the joint account and the Casualty Company made a further deposit in the joint account of $5,700 but it did not deposit in the joint account a sufficient sum of money to complete the plastering contract."

As Conclusions of Law the Court found:

"Plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. * * *."

We cannot agree with this Conclusion of the trial Court.

Acquiescence by defendant in a modification of the contract, Exhibit "A", which modification was thereafter carried out, deprives the conduct of the plaintiff of any taint of inequity. Becker v. Becker, 250 Ill. 117, 95 N. E. 70; Langley v. Devlin, 95 Wash. 171, 163 Pac. 395.

Such acquiescence, we think, was shown by the evidence in the case at bar.

[fol. 128] We do not wish it to be thought that we are departing from the well-established rules regarding the

granting of the remedy of specific performance. Such is not our intention.

This Court, in Shubert v. Woodward, 167 F. 47, has said (p. 54):

"The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules, and practice of equity jurisprudence. Hennessey v. Woolworth, 128 U. S. 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor. Yet these principles and rules and this practice serve to inform the intellect and to enlighten the conscience, and by them the judicial discretion of the court must be guided."

In Town of Glenwood Springs v. Glenwood Light & W. Co., 202 F. 678, this Court lays down the rule (p. 684):

"And courts of equity will not ordinarily compel the specific performance of a contract, either by decree or by an injunction against its violation, at the suit of a party who is guilty of a *substantial* breach of it." (Italics supplied.)

In Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co., 11 F. 284 (C. C. A. 8), the Court states the rule as follows:

"A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of *bad faith, fraud,* or any *unconscionable act* in the transaction which forms the basis of his suit." (Italics supplied.)

We think relief can be granted in the case at bar without doing violence to the foregoing rules.

[fol. 129] The breach of the contract (Exhibit "A") on the part of plaintiff, which defendant alleges precludes plaintiff from obtaining the remedy of specific performance, is the failure by plaintiff Casualty Company to deposit in the joint account agreed upon in said contract, Exhibit "A", sufficient moneys to pay for completing the plastering contract. There was deposited in the joint account by plaintiff the sum of $10,700, but this was not sufficient to pay in full the amount due or to become due for plastering.

Defendant makes these allegations in its answer:

"Defendant admits that the plaintiff deposited in said account a total of Ten Thousand Seven Hundred ($10,700) Dollars, but states that said sum was Seventy-eight Hundred ($7,800) Dollars less than the said plaintiff had so promised and agreed to deposit, and said plaintiff thereby breached said contract and thereby forfeited all rights thereunder.

"* * * but the said defendant alleges that the plaintiff, in part performance only of the said supplemental contract deposited the said sum of Ten Thousand Seven Hundred ($10,700.00) Dollars and refused to deposit the further sum of Seventy-eight Hundred ($7,800) Dollars, under and by virtue of the said contract and that for said reason the said contract was broken by the said plaintiff to the great damage of the defendant Morley Construction Company."

We have set out heretofore the testimony of the witnesses Herbert F. Morley and Kelly relative to this alleged breach. The testimony may be sufficient to show that plaintiff Company did not strictly fulfill its agreement as to the amount of its deposit in the joint account.

But other considerations must be kept in mind. The Morley Construction Company was insolvent. The contract, Exhibit "A", was entered into for the purpose of extricating the defendant Morley Construction Company from financial difficulties in connection with the construction contract, and for completing the construction contract. This was the purpose of establishing the joint account provided for in Exhibit "A". This purpose was accomplished. The construction contract was completed to the satisfaction of the United States Government, and final payment ordered.

There were facts which led the Casualty Company to be-
[fol. 130] lieve the Morley Construction Company did not intend to use the funds coming from the United States Government in the payment for labor and materials used on the construction contract.

There is no sufficient showing that the failure of plaintiff to deposit the full amount promised caused any delay or resulted in any damage to Defendant Company. On the contrary, at the time of answering by defendant in the present suit, the joint account established by Exhibit "A" still had in it, according to the allegations of the answer, the sum of $7,900.

It may be noted that the sixth clause of Exhibit "A" provides:

"Sixth. The Morley Construction Company hereby agrees to pay to the Maryland Casualty Company any and all moneys advanced to them for payment of plasterers' claims or other laborers' claims on the D. Giamberardino & Sons contract and any and all moneys advanced by the said Maryland Casualty Company to assist in the completion of the D. Giamberardino & Sons contract."

It should also be noted as perhaps illuminating the situation, that Herbert F. Morley testified as follows:

"The creditors were pressing the Morley Company during this time.

"Q. How did it happen that you had $7,900.00 in the bank that you hadn't paid out if they were pressing you so hard?

"A. Well, we proceeded to pay off the smaller accounts out of that fund and it didn't represent enough to take care of any of the larger ones.

"Q. Isn't that what happened, Mr. Morley, didn't you tell Mr. Kelly you wanted to let that account ride as it was and wait until you got the whole amount and then try and make advantageous compromise settlements when you had the whole amount available?

A. I believe I did."

When the whole of the evidence is examined closely, we do not find any unconscionable or fraudulent act on the part of plaintiff; nor do we think that the failure of the plaintiff to fulfill its obligation under Exhibit "A" with strictness, precludes it, under all the circumstances, from asking relief

[fol. 131] in the case at bar by way of specific performance, or that the Court will abuse its discretion in granting the same.

Nor do we think a decree for specific performance of the contract, Exhibit "A", is impossible of being carried out.

A court of equity should mould its decree to meet the exigencies of the situation.

What the plaintiff is seeking by its present complaint is to have the moneys still coming to defendant under the construction contract applied to payment of bills for labor and materials furnished for the completion of the construction.

The circumstances appearing in the record warrant such an application.

That such moneys come within the provisions of the contract, Exhibit "A", we think too clear for argument.

An injunction against using the moneys except as agreed upon, and an order to place said moneys when received in the joint account and disburse the same in payment of just claims for labor or materials, would meet the requirements and rights of plaintiff and would not be impossible of performance.

We think a decree along such lines should be granted by the trial court.

As to Exoneration

The trial court denied the relief of specific performance and granted the relief of exoneration.

We are in grave doubt whether exoneration can properly be granted.

In 50 C. J., p. 244, the statement is made:

"Before maturity of the debt or accrual of liability the surety has no right of action in equity to be indemnified against apprehended danger of loss by reason of his undertaking."

It would seem from this statement that there can be no exoneration except from an existing liability against the surety. This is also the result of the cases as we read them. [fol. 132] Ordinarily the liability of the principal and the liability of the surety arise at the same time; and the cases hold that when the liability arises, the surety may sue for exoneration; but this is on the assumption that the liability

of the principal and the liability of the surety arise at the same time.

In the case at bar the situation is different. The liability of the principal arises, in the absence of special agreement, when the labor or materials are furnished.

But a Statute (40 U. S. C. A., Sec. 270) controls the beginning of the liability of the surety.. The Statute provides, among other things, as follows:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later * * *."

This Statute has been construed to the effect that there is no liability or cause of action against the surety until the expiration of the six months mentioned. Texas Cement Co. v. McCord, 233 U. S. 157; Stitzer v. United States, 182 F. 513; People v. Metropolitan Surety Co., 211 N. Y. 107. [fol. 133] In the McCord case the Court used the following language (p. 162):

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon a

cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

In the Metropolitan Surety Company case, the Court said (p. 114):

"Obviously the entire liability of the surety company to the claimant for the materials furnished by it under the contract between it and the Church Construction Company arises through the execution of the bond by the surety company as a surety for the construction company. The claimant could reach the surety company through the bond alone, which, with the statute as a part of it, defines and limits the rights of the claimant as against it, and the method and tribunals through which those rights might be enforced. His right of action against it through any form of legal proceeding was created by the bond and the statute, and must be enforced pursuant to the terms and conditions of the statute and not otherwise. (Stitzer v. United States, 182 Fed. Rep. 531; United States v. Boomer, 183 Fed. Rep. 726; Baker Contract Co. v. United States, 204 Fed. Rep. 390.) It was, however, a qualified and conditional, and not an absolute right or cause of action. An act of Congress, which at the same time and in itself authorizes or creates a new cause of action and prescribes the limitations thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limi-
[fol. 134] tations, and a compliance with the conditions which it pre-
scribes is indispensable to the enforcement of the right it creates, because they are parts of or elements in the right itself and not limitations of the remedy only. The limitation of the remedy is a limitation to the right."

It would seem to follow from these authorities that there was no liability on the part of the surety in the case at bar until the expiration of the six months' period. This being

the situation, there was nothing from which the surety could be exonerated prior to the expiration of that period, and any suit prior to that time would be premature.

It is conceded that the six months' period had not expired in the case at bar.

For this reason, we have preferred not to place the relief to be granted on the basis of exoneration, but rather on the basis of specific performance of the agreement, Exhibit "A".

As to the Matter of Subrogation

This form of relief seems not to be pressed on the present appeal. Furthermore, we think the trial Court was correct in its disposition of this matter, and, therefore, discussion is pretermitted.

The case is accordingly remanded for modification of the decree in accordance with the foregoing views, and as so modified, the decree is Affirmed.

[fol. 135] In United States Circuit Court of Appeals, Eighth Circuit

No. 10477

Morley Construction Company and Merchants Bank of Kansas City, Missouri, Appellants,

vs.

The Maryland Casualty Company, a Corporation

Decree—June 22, 1936

Appeal from the District Court of the United States for the Western District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that this cause, be, and the same is hereby, remanded to the said District Court with directions for modification of its decree in accordance

with the views expressed in the opinion of this Court, and as so modified the said decree is by this Court hereby affirmed.

It is further ordered by this Court that The Maryland Casualty Company, a Corporation, have and recover against the Morley Construction Company and Merchants Bank of Kansas City, Missouri, the sum of Twenty Dollars for its costs herein and have execution therefor.

And it is further ordered by this Court that a copy of the opinion filed herein be transmitted with the mandate to the said District Court.

June 22, 1936.

[fols. 136-148] Petition for rehearing, covering 13 pages, filed July 7, 1936, omitted from this print. It was denied and nothing more by order of July 20, 1936.

[fol. 149] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—July 20, 1936

The petition for rehearing filed by counsel for appellants having been considered, It is now here ordered by the Court that the same be, and it is hereby, denied.

July 20, 1936.

In United States Circuit Court of Appeals

Motion of Appellants for Stay of Issuance of Mandate—Filed July 30, 1936

And now again come appellants and respectfully show to the court that they desire to have the opinion and decision in this court and cause reviewed on certiorari by the Supreme Court of the United States in accordance with the statutes and rules of court in such cases made and provided upon the ground, among others, of conflict between the opinion and decision herein and the decisions of the Circuit Courts of Appeal for other circuits and decisions of the

Supreme Court of the United States and the general law on the question.

Wherefore, the said appellants respectfully pray this Honorable Court to make its order staying the issuance of the mandate for thirty days, in accordance with the rule of this court in such case made and provided.

William Buchholz & Martin J. O'Donnell, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 150] In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—August 3, 1936

On Consideration of the motion of appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is herby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 3, 1936.

[fol. 151] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 152] Supreme Court of the United States

Order Allowing Certiorari—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified

copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter William Buchholz. File No. 40,865. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 325. Morley Construction Company et al., petitioners, vs. Maryland Casualty Company. Petition for writ of certiorari and exhibit thereto. Filed August 31, 1936. Term No. 325, O. T., 1936.